OPINIONS

OF THE

CORPORATION COUNSEL
and ASSISTANTS

JULY 1, 1967 to JUNE 30, 1973

Compiled and Edited under the Supervision of

RICHARD L. CURRY

Corporation Counsel

CITY OF CHICAGO
DEPARTMENT OF LAW

VOLUME XXVI

PUBLISHED BY AUTHORITY OF THE CITY COUNCIL

1973

PREFACE

This 26th volume of the Opinions of the Corporation Counsel extends the chronology of legal guidance offered city officials and students of municipal law by the Chicago Law Department into its second century. The series began with formal compilation of letters of opinion of the Corporation Counsel in 1871. The preservation and indexing of opinions since then has served as an expanding legal reference manual and as a history of municipal jurisprudence for the past one hundred years.

By coincidence, the six years covered in this volume similarly bridge the transition from the 1870 Illinois Constitution to the Illinois Constitution of 1970. The strict limitation on municipal power; viz, the doctrine that a municipality possesses only those powers expressly granted by the General Assembly, has given way to the reality of Home Rule under a constitutional grant of authority to the City to "exercise any power and perform any function pertaining to its government and affairs". Because of this new legal basis upon which to measure and solve perplexing urban problems, and because of the innovative and imaginative legal advocacy which has emanated from the staff of the Department of Law for many years, a healthier legal climate has never existed for a great city.

The years immediately following the adoption of the new Illinois Constitution afford a unique opportunity to the Corporation Counsel and his staff—the opportunity, as it were, to write on a clean slate. Relieved of the restraints of legal precedent dating to a bygone era, and presented with unlimited matters of first impression as the new Constitution is applied and tested, we have indeed been afforded an unparalleled professional challenge.

By specifically mandating a liberal construction to the "powers and functions of home rule units", the authors of the Constitution have encouraged municipal attorneys to strive to shape and define its provisions in a manner which will allow local government the latitude necessary to employ relevant and timely programs in response to the needs of the community, which will encourage local solutions to local problems, and which will create a flexible and timeless document.

At this important juncture in the law of our State, no attorney could have a more exciting client than the City of Chicago, rich in history and tradition, proud of its accomplishments and confident of its future. For the honor and opportunity of being the Counsel for this great municipal corporation, I am indebted and deeply grateful to Mayor Richard J. Daley.

The letters of opinion in this volume are the product of municipal attorneys who serve their profession as skillful and articulate practitioners and who serve their City as surrogates of society so that law may be a means of ordering community life for human betterment. I wish to pay tribute to them and to express my gratitude and appreciation for their efforts and support as well as for the friendship and cooperation which I have received from the entire staff of the Department. I also wish to acknowledge with thanks the scholarly work of Vincent F. Vitullo, Professor of Law at DePaul University who compiled, edited and indexed this volume.

RICHARD L. CURRY,
Corporation Counsel.

June 30, 1973.

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Charles M. Walker	1899-1903
Edgar Bronson Tolman	1903-1905
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John W. Beckwith	1914-1915
Richard S. Folsom	1915-1915
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EXPLANATORY NOTES

SCOPE OF THIS VOLUME

The opinions in this Volume cover the period beginning with July 1, 1967, and ending with June 30, 1973. However, the opinions in this Volume are not all of the opinions issued by the Department of Law during that period of time. To include every opinion issued by the Department of Law would make this work unduly repetitious and would increase its bulk without any increase in its value as a reference tool. Therefore, only those opinions deemed to be of general significance were included in this Volume.

However, we hasten to advise City Officials that an expression of legal opinion issued by this office is still a binding opinion for their guidance regardless of the fact that it may not appear in this Volume.

SPECIAL FEATURES

To make this Volume a more valuable research tool, three cross-reference tables have been included. The first cross-reference table enables the reader to locate any letter of opinion in this Volume which directly cites and interprets a provision of the Chicago Municipal Code. The second table permits the reader to locate those opinions in this Volume which directly interpret any provision of the Illinois Revised Statutes. The third reference table is a table of cases which permits the reader to locate easily any case which was the primary subject matter of any opinion in this Volume. All three tables are located in this Volume immediately following the index.

In addition, it should be noted that the index to this Volume is cumulative and covers the contents of this Volume as well as the contents of Volumes 24 and 25.

DATA GIVEN WITH OPINIONS

Above each opinion in this Volume there is printed the name of the office or officer to whom the opinion was written, the initials of the author of the opinion, and the date of the opinion. Occasionally a letter of opinion is addressed to a private party having official business with the City. In such cases, the addressee of the opinion is designated by a descriptive term or by his initials.

OPINIONS

OF THE

CORPORATION COUNSEL
and ASSISTANTS

CHAPTER I—POWERS AND DUTIES OF CITY COUNCIL AND CITY OFFICERS

Section A. CITY COUNCIL

"WAIVING" ALDERMANIC SALARY

(Alderman, 44th Ward—S. R. D.—July 22, 1971)

We acknowledged receipt of your communication requesting our opinion as to whether the City could recognize a document in which you would "waive" your aldermanic salary and order the City to pay the same directly to "a not-for-profit citizen's committee." You state:

> "I am currently trying to get the Federal Taxes on my 'Aldermanic Salary' removed since I do not use any of these funds. Our Citizen Advisory Council's tax lawyer informs me that several steps are required for this to be done. I need first an opinion from the City's Legal Department that my salary can be waived and paid over to a not-for-profit citizen's committee. It is my understanding 1) that many Aldermen turn over the monies from their office expense account ($6,000 a year) even though the checks are made out to them personally and 2) that at least one other Alderman is reputed previously to have used his salary for the purpose of running an Aldermanic Office and providing ward services.
>
> "I would appreciate an opinion on this matter from the legal department. I do not mind turning over my salary, but it is a great burden to have Federal Taxes deducted from money which I never spend."

We are of the opinion that your aldermanic salary cannot legally be assigned and cannot legally "be waived and paid over to a not-for-profit citizen's committee" by the City.

Section 21-23 of the Revised Cities and Villages Act 1941 (Ill. Rev. Stat., 1969, chap. 24, par. 21-23) provides, in part, as follows:

> "The aldermen * * * may receive for their services such compensation as shall be fixed by ordinance * * *."

Section 4-2 of the Municipal Code of Chicago provides, in part, as follows:

> "Each alderman * * * shall receive as compensation for his services as such the sum of eight thousand dollars per annum."

The Annual Appropriation Ordinance for the year 1971 provides for a City Council Appropriation of $826,460 "for personal services" (p. 16) and for salary of each alderman of $8,000 a year (p. 75).

It is, therefore, apparent that the salary of an alderman is appropriated for and paid for the personal services rendered by the alderman. The courts of Illinois have consistently held that the assignment by a public official of unearned salary is void as against public policy. In *City of Chicago* v. *People*, 98 Ill. App. 517 (1901), the court said (pp. 520-521):

> "The doctrine is well settled that a municipal officer can not assign his unearned salary. His undertaking so to do is but an undertaking, unenforceable and of no validity. The law also prohibits assignments of salary being had by indirection or effected by having the official appoint an attorney authorized to receive the salary and turn the same over to an assignee.

"The performance of public service is secured by protecting those engaged in performing public duties, and it is not upon the ground of their private interests, but upon the necessity of securing an efficient public service, by seeing to it that the funds provided for the maintenance of government officials should be received by them at such periods as the law has appointed for their payment.

"If assignments of the salaries of public officers were permitted, then the assignees would be entitled to receive the salaries directly, and thus to take the place of the assignors in respect to the emoluments, leaving the duties to be discharged by said officers, a barren charge, to be borne by the assignees. Such a condition of affairs would inevitably produce results disastrous to the efficiency of the public service.

"In this case, with the private equities and good faith between the relator and those to whom he has assigned his salary, the court has nothing to do.

"The position of the relator is sustained and the city officers are commanded to give to him the checks, and the money to which he is entitled, not because it commends his conduct toward the assignees from whom he has obtained money, or holds that he ought not to pay them as he has promised, but because the public interests are such that the assignment by a public officer of his unearned salary can not be permitted or treated by the courts otherwise than as void.

"It would be in the highest degree harmful to the public that municipal corporations should be permitted to be turned into agencies through which the collection of private debts might be enforced.

"A municipal corporation exists for the public welfare only, and it can not be forced into a position by which its duty as to its officials in respect to their salaries shall be, not to pay them in accordance with their lawful right, but to pay the debts which they may be owing to creditors, or their stipend to those to whom they might have assigned it." [Emphasis added.]

In *Merwin* v. *City of Chicago,* 45 Ill. 133 (1867), the court held that the City is not liable to the processes of garnishment, no matter what may be the character of the indebtedness.

In *Addyston Pipe and Steel Company* v. *City of Chicago,* 170 Ill. 580 (1897), the court held that a creditor's bill will not lie against a municipal corporation to enable the complainant to reach a debt owed by the municipal corporation to a third party.

In *Lamb* v. *Lamb,* 256 Ill. App. 226 (1930), the court held it is against public policy to compel the City of Chicago to pay the salary of an employee to a receiver for the employee, appointed by a suit in the nature of a creditor's bill by a judgment creditor of the employee.

In *Goodwin State Bank* v. *Wise,* 263 Ill. App. 291 (1931), the court held that a creditor's bill would not lie against the Treasurer of the Road and Bridge Fund of the Town of Middlefork to apply monies in said fund for the payment of a judgment entered against Wise in his individual capacity.

In *Brazil* v. *City of Chicago,* 315 Ill. App. 436 (1942), the court held that one could not enforce an attorney's lien against a municipality.

In *Quitsow* v. *Hennessey,* 338 Ill. App. 176 (1949), the court held that the plaintiff could not maintain a creditor's suit against the Sanitary District of Chicago to enforce a judgment entered against a public employee because of public policy.

In *Sherwin and Sherwin* v. *City of Chicago,* 21 Ill. App. 2d 124 (1959, Abst. Decision), the court refused to enforce an attorney's lien against the City, because of the public policy that a municipal corporation cannot be made an instrument or agency for collection of private debts.

The Office of the Corporation Counsel has consistently held that the assignment by a public official of unearned salary is void as against public policy (18 Opinions of the Corporation Counsel, p. 158; 23 Opinions of the Corporation Counsel, p. 189; 24 Opinions of the Corporation Counsel, p. 152).

In light of the foregoing, it is our opinion that the City of Chicago could not legally recognize an assignment of your salary nor could the City legally pay your salary directly "over to a not-for-profit citizen's committee."

REPORTING ON ALDERMANIC EXPENSE MONEY

(Alderman, 46th Ward—L. J. S.—January 26, 1973)

We have before us your letter of December 20, 1972. You asked: "In fiscal 1973, is there any bar to an alderman taking his salary, expense allowance and auto expense checks, depositing them in his checking account and reporting all to the IRS as gross income? What requirements are there for reporting to the city how expense money is spent? What restrictions are there on how it can be spent if income tax is paid on it?"

An alderman's salary may be spent and handled as he pleases. The expense allowance and auto expense allowance (budget code numbers 1210.801 and 1210.200) are appropriations for specific purposes: "For operating expense of the offices of the Aldermen in connection with their official duties" (budget code number 1210.801); and "For allowance to members of the City Council for expenses incurred in the use, maintenance and operation of personally owned automobiles in connection with official duties at not to exceed $55.00 per month: Automobile allowance—schedule rate" (buget code number 1210.200). They may be used only for the purposes for which appropriated. The monies are not appropriated for the personal use or pleasure of the Aldermen, nor as personal compensation. Intentional use of these funds for personal purposes, therefore, would appear to constitute theft under the provision of the Illinois Criminal Code of 1961, Ill. Rev. Stat. 1971, ch. 38, par. 16-1, which states: "A person commits theft when he knowingly: (a) Obtains or exerts unauthorized control over property of the owner. . . ", or, at least, would constitute the civil tort of conversion.

Chapter 7, sections 7-22, 7-23 and 7-26 of the Municipal Code of Chicago grant the comptroller sufficient power, at his discretion, to review the use of the aldermanic expense allowances, but no specific reporting is required.

LEGALITY OF EXPENDITURES FOR ADVERTISING

(Purchasing Agent—C. F.—July 6, 1967)

Transmitted herewith, pursuant to the attached memorandum, is the above cited request for a legal opinion on ads for CHICAGO Magazine.

There is ample legal precedent which holds that besides procuring materials, supplies and labor, a municipality, like a business, must expend moneys for purposes that only indirectly affect its daily operations in our highly competitive economic society. These purposes include advertising, promotion, publicity, and the support of municipally-related organizations, all designed to broadcast advantages to attract trade and industry to the community.

We have conferred with Mr. Earl Bush and others on this matter and based on these conversations and a review of the facts stated in the attached memorandum, it is our opinion that the said request for payment in the amount of Fourteen Thousand, One Hundred Dollars ($14,100.00) is in compliance with the provisions of Chapter 24, Section 8-2-1 through 8-2-8 (Ill. Rev. Stat. 1965), which provisions pertain to annual ordinance appropriations.

Our approval as to form and legality has been indicated thereon.

PROCEDURES FOR FILLING VACANCIES ON THE CITY COUNCIL

(Municipal Reference Librarian, Milwaukee, Wisc.—H. L. R.—Sept. 18, 1968)

Your letter addressesd to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response. You ask what procedure Chicago follows in filling vacancies on the City Council and in the office of Mayor, which occur between elections. You also inquire as to whether or not the successor who fills the vacancy does so for the unexpired term, or only until the next local election.

If a vacancy occurs in the City Council, a special election may be called to fill the unexpired term, as provided in Chapter 24, paragraphs 3-2-7 and 3-2-8 of the Illinois Revised Statutes (1967). If a vacancy occurs in the office of Mayor and the unexpired term has at least one year to run, a special election is held as provided in Chapter 24, par. 3-4-6, Ill. Rev. Stat. (1967). But, if the unexpired portion of the term is less than one year, the City Council shall elect one of its members as Acting Mayor until the next regular election for Mayor.

Enclosed are copies of the above cited paragraphs. We hope that this information will be of assistance to you.

CLOSED SESSIONS OF CITY COUNCIL

(Council Service Bureau, N.Y.—D. P.—August 26, 1971)

This is in response to your phone call of August 24. You asked at that time whether or not the City Council of the City of Chicago ever sat in closed executive session to take testimony from witnesses; whether such testimony was recorded electronically or by stenographer; and whether any such record could be made public.

All sessions of the Chicago City Council are open to the public. It does not sit, as a body, to hear testimony. I am informed by people with a long familiarity with Council proceedings that the Council has not within recent memory held a session to which the public was not invited.

All matters requiring extensive consideration are referred to committee. The rules of the Council require that notice of all committee meetings be posted publicly not less than three days prior to any such meeting. Nowhere do the rules provide for closed meetings.

In the event that this does not answer your question, please feel free to call me again. You may also find it useful to communicate with Mr. Daniel Cepa, Administrative Assistant to the City Clerk, Room 107 City Hall, Chicago, Illinois 60602, telephone (312) 744-6861.

DUTIES OF THE PRESIDENT PRO TEMPORE OF THE CITY COUNCIL

(Alderman, 46th Ward—R. L. C.—October 18, 1972)

In response to your letter of October 15, 1972, please be informed that Rule 36 of the Rules of Order of the City Council of the City of Chicago, adopted April 22, 1971, provides in part that:

> "The President Pro Tempore of the City Council shall serve as an ex-officio member of all standing committees and his membership shall be in addition to the aforementioned limitations."

As such, the President Pro Tempore may vote on all matters coming before any committee at which he is in attendance.

Rule 1 of the aforesaid Rules of Order provides that:

"The Mayor shall be the presiding officer of the Council."

Rule 4 provides that:

"The presiding officer . . . shall decide all question of order . . . ."

Rule 47 provides that:

"The rules of parliamentary practice comprised in the latest published edition of Robert's 'Rules of Order Newly Revised' (75th Anniversary Edition) shall govern the Council in all cases to which they are applicable and in which they are not inconsistent with the special rules of this Council."

Therefore, there is no need for a position of parliamentarian.

KEEPING OF MUNICIPAL PAPERS BY CITY CLERK

(City Clerk—D. P.—July 11, 1969)

You have requested an opinion from the Corporation Counsel as to whether the City Clerk is obliged to accept and store microfilmed documents belonging to the Public School Teachers' Pension and Retirement Fund of Chicago. Accompanying your letter is a copy of the Fund's request.

It is provided by statute that the City Clerk "shall keep . . . all papers belonging to the municipality the custody and control of which are not given to other officers" (Illinois Revised Statutes 1967, chapter 24, paragraph 3-10-7). The question, therefore, is whether the Fund's documents may be treated as "belonging to the municipality". We believe they cannot.

The Illinois Pension Code describes the nature of pension funds as follows:

> Any annuity and benefit fund . . . is hereby declared to be a pension fund and to be a body politic and corporate. . . . [Ill. Rev. Stat. 1967, ch. 108½, par. 22-401.]
>
> Each such pension fund is hereby declared to be created . . . separate and apart from the corporate purposes of . . . any county, city, town, municipal corporation or body politic and corporate in the State. . . . [Ill. Rev. Stat. 1967, ch. 108½, par. 22-402.]

It seems clear from this language that the Fund is not conceptually to be treated as a part of the City of Chicago. Neither may it be treated so from a functional point of view: the city treasurer is custodian of the Fund's assets (Ill. Rev. Stat. 1967, ch. 108½, par. 17-147), but only as a matter of convenience; his custody is subject to "the control and direction" of the Fund's board of trustees. Similarly, while the city council provides the public contribution to the Fund through a tax levy, it must do so, at the demand and direction of the board, at a statutorily established rate (Ill. Rev. Stat. 1967, ch. 108½, par. 17-128).

We conclude, therefore, that the Fund is legally independent of the City of Chicago, and that its records do not belong to the city. It follows that the City Clerk is under no legal obligation to accept and store records of the Fund.

CONTROL OVER THE NATURE OF THE CITY COUNCIL

(Law Intern—City of Omaha—L. J. S.—March 29, 1973)

Your letter of January 30, 1973 has been referred to me for answer by Richard L. Curry, Corporation Counsel of the City of Chicago.

The City of Chicago is a home rule unit pursuant to constitutional grant. ("Any municipality which has a population of more than 25,000. . . ." Art. VII, Section 6(a), Illinois Constitution of 1970). No charter is required.

However, the new constitution prescribes special provisions relating to officers. Article VII, Section 6(f) provides, "A home rule unit shall have the power to provide for its officers, their manner of selection and terms of officers only as

approved by referendum or as otherwise authorized by law." Thus, the ultimate control over the nature of the City Council resides in the local electorate by referendum, similar, in this respect, to a City Charter.

Under the prior constitution (Art. II, Section 34, Illinois Constitution of 1870) there was a "little charter" of the City of Chicago (Ill. Rev. Stat. 1970, ch. 24, Art. 20) which prescribed the method of election and number of aldermen. This was a state statute adopted by local referendum.

HOME RULE—SALES

(Commissioner, Department of Consumer Sales, Weights & Measures—A. H.—June 10, 1971)

Your recent request for an opinion with respect to whether it will be necessary for the City of Chicago to introduce ordinances relating to curbing abuses in chain referral sales, credit violations, repossessed goods, collections of obligations, and retail installment sales, has been referred to the undersigned for consideration and response.

You ask whether it will be necessary for the City of Chicago to adopt ordinances in order to implement provisions now regulating the foregoing activities by State statute under the title of the Retail Sales Act, or whether the granting of home rule powers automatically gave us the authority to investigate and enforce the laws as written by the State. Please be advised that in our opinion the home rule powers delegated to home rule units under the 1970 Constitution are self-executing, that is, the power to adopt ordinances concerned with home rule matters, exists without more; however, said powers must be adopted by ordinance and are not carried over as ordinances merely by reaching the effective date of the 1970 Constitution of Illinois.

Furthermore each power sought to be adopted by a municipality under the new home rule grant contained in the 1970 Constitution must be carefully analyzed with respect to a number of legal criteria set forth in the Constitution itself, which may have an effect upon the proposed legislation, depending upon the particular subject matter. Therefore, the question you pose is one which should not and cannot be answered in general terms in the absence of the specific provision sought to be adopted being presented to this Department for review.

VALIDITY OF CHICAGO'S DISORDERLY CONDUCT ORDINANCE

(The City Council of the City of Chicago—D. P., M. E. A.—November 20, 1970)

On November 17, 1970 the Supreme Court of Illinois affirmed the judgment of the Circuit Court of Cook County in *The City of Chicago* v. *Greene,* finding the defendant guilty of the offense of disorderly conduct in violation of Section 193(d) of the Municipal Code of the City of Chicago.

It was determined during the trial that the defendant was part of a large and disorderly crowd gathered in Lincoln Park on the evening of August 25, 1968; that the defendant failed to obey a police order to disperse and was arrested. He argued on appeal that he was not himself disorderly and had not directly participated in violent conduct; therefore, the ordinance should not apply to him.

The Supreme Court ruled, however, that

> ". . . the offense arises from a failure to heed an order to disperse when others . . . are engaged in disorderly conduct and it is not necessary that the person consequently charged was engaged in other acts of disorderly conduct."

In so ruling the Supreme Court reaffirmed the constitutional validity of Section 193(d) of the Municipal Code of the City of Chicago.

Enclosed is a copy of the Court's opinion.

Section B. POLICE DEPARTMENT

INTERPRETATION OF ILL. REV. STAT., CH. 38, § 206-5, EXPUNGING OF ARREST RECORD

(Legal Coordinator to the Superintendent of Police—M. E. A.—January 30, 1970)

Reference is made to the January 26, 1970 letter of Charles Finston, Aide and Legal Coordinator of the Chicago Police Department, in which he requests the answers to certain questions concerning newly enacted Illinois Revised Statute 1968, Ch. 38, §206-5 You will recall that previous questions in regard to this provision were answered in our letters to you dated October 3, 1969 and January 7, 1970. The following are your questions followed by our answer.

q.1. "When a petition is served on prosecuting authority, should the Chicago Police Department be notified so that a search for a previous conviction can be made prior to hearing on said petition and is not the petitioning party obliged under the Supreme Court rules of practice to serve the Department with a copy of the petition?"

a.1. Section 206-5 provides that "Notice of the . . . petition shall be served upon the prosecuting authority. . ." There is no provision as to service on the Chicago Police Department. However, the State's Attorneys office should promptly notify you of any petition served upon it.

q.2. "In those cases where a court order is issued to expunge records, will this department be fixed with the responsibility of retrieving fingerprints that were transmitted to the F.B.I. and the Illinois State Bureau of Identification?"

a.2. No.

q.3. "Is the Chicago Police Department responsible for requesting a search for conviction information from another agency such as: Clerk of Court, Secretary of State, Illinois State Bureau of Identification, F.B.I., or various municipal agencies?"

a.3. No.

q.4. "Are indictable misdemeanors to be considered as Felonies in interpreting the law?"

a.4. No.

q.5. "When an arrest record clearly does not fall under the provisions of the law, do we honor the court order, call the discrepancy to the attention of the court, or to the prosecuting agency."

a.5. When an arrest record clearly does not fall under the provisions of Section 206-5, you should immediately notify the State's Attorneys office of this fact.

q.6. "Do convictions in another jurisdiction apply? Should we wait for the results of the F.B.I. and State Bureau checks before returning said arrest records?"

a.6. Convictions in another jurisdiction are not covered by Section 206-5.

q.7. "Does the law operate retroactively, thus requiring the Department to return arrest records which ante-date the effective date of the new law, August 29, 1969, when approved by the Governor. (See attachment No. 1)."

a.7. Section 206-5 does not operate retroactively.

q.8. "Is the Department obliged to return records if the order entered for said return fails to indicate full compliance with the law by the petitioning party, as the requirement that petition shall be accompanied by a waiver. (See attachment No. 2)."

a.8. If the Court order does not comply with Section 206-5, you should notify the State's Attorneys office immediately of this fact and urge that they appeal from the Court order. The State's Attorneys office can then secure a supersedeas so that compliance with the Court order will be postponed until the validity of that order is passed upon by the Illinois Appellate Court.

EXPUNGING OF ARREST RECORD

(Superintendent of Police—M. E. A.—January 7, 1970)

Reference is made to your letter of January 5, 1970 and the subsequent telephone conversation between Mr. Finston and the undersigned in regard to a clarification of our opinion of October 3, 1969. The aforementioned opinion concerned recently enacted House Bill 2735 which added the following language to Illinois Revised Statutes 1967, Ch. 38, Section 205-6:

> "A person, not having previously been convicted of any criminal offense or municipal ordinance violation, charged with a violation of a municipal ordinance or a misdemeanor, if he was acquitted or released without being convicted, may petition the Chief Judge of the Circuit wherein the charge was brought to have the record of arrest expunged from the official records of the arresting authority. Notice of the above petition shall be served upon the prosecuting authority charged with the duty of prosecuting said offense. Such petition by the accused shall be accompanied by a waiver, in a manner satisfactory to the Court, waiving any and all claims he or any other person may have against the arresting officer or officers in the case arising out of the incident of arrest."

Your most recent inquiry appears to be two-fold:

(1) Is there a lack of compliance with Section 205-6 when the Chief Justice of the Criminal Division of the Circuit Court, rather than the Chief Judge of the Circuit Court, enters the order pursuant to that Section?

(2) Are photographs, fingerprints and other records which are not formal "records of arrest" subject to return pursuant to Section 205-6?

As to your first inquiry, it is our opinion that we should not contest the authority of the Chief Justice of the Criminal Division to enter a Section 205-6 order. Although Section 205-6 designates the Chief Judge of the Circuit Court, he can delegate this authority to another judge. In this case, it is perfectly proper and logical that he should delegate this authority to the Chief Justice of the Criminal Division.

As to your second inquiry, it is our opinion that if the photographs, fingerprints and other records note the fact, date or other circumstances of an arrest, they constitute "records of arrest" within the meaning of Section 205-6 and would be subject to a court order thereunder.

EXPUNGING OF ARREST RECORD

(Superintendent of Police—M. E. A.—October 3, 1969)

Reference is made to your letter of September 23, 1969 in which you request our opinion as to House Bill 2735, recently approved by the Governor, which adds the following language to Illinois Revised Statutes 1967, Ch. 38, Section 205-6:

> "A person, not having previously been convicted of any criminal offense or municipal ordinance violation, charged with a violation of a municipal ordinance or a misdemeanor, if he was acquitted or released without being convicted, may petition the Chief Judge of the Circuit wherein the charge

was brought to have the record of arrest expunged from the official records of the arresting authority. Notice of the above petition shall be served upon the prosecuting authority charged with the duty of prosecuting said offense. Such petition by the accused shall be accompanied by a waiver, in a manner satisfactory to the Court, waiving any and all claims he or any other person may have against the arresting officer or officers in the case arising out of the incident of arrest."

The following are your questions in regard to House Bill 2735 followed by our replies:

"1. Does the reference to 'A person not having previously been convicted of any criminal offense or municipal ordinance violation . . .' include non-conviction for any form of traffic violation?"

The language you quote refers to non-conviction for any traffic violation which is either a violation of a municipal ordinance or a misdemeanor under state law. It does not apply to a state felony.

"2. Does the phrase 'record of arrest' include only the arrest citation which may be issued or does the record also include photographs, fingerprints and other related records?"

The phrase "record of arrest" refers to the arrest citation and any record noting the fact of arrest. It does not refer to photographs, fingerprints and other related records insofar as they do not catalogue the fact of an arrest.

"3. Must the person who seeks to expunge an arrest record file a petition with the Chief Judge of the Circuit Court personally, or may said petition be addressed to the Chief Judge although filed with the Clerk of the Circuit Court?"

The petition may be filed with the Clerk of the Circuit Court; however, it may only be acted upon by the Chief Judge of the Circuit Court or any other judge specifically designated by him.

"4. Should the required waiver to be filed with said petition contain language which will be satisfactory also to the Corporation Counsel or State's Attorney, as well as the Chicago Police Department?"

The waiver need only satisfy the Court. However, it is anticipated that the Court would seek concurrence with the Corporation Counsel, State's Attorney, Police Department and any other interested party as to its sufficiency.

"5. Since the Chief Judge may in his discretion enter an order expunging said arrest records, is the Chief Judge required in all cases to hold a public hearing with all necessary parties present?"

A public hearing is not required by House Bill 2735. Again, it is anticipated that the Court would not expunge any arrest record without notification to the appropriate public officials or their representatives.

Your suggestion that a conference in regard to House Bill 2735 be held between representatives of the Circuit Court, Corporation Counsel, State's Attorney and Police Department is an excellent one. If the Circuit Court and State's Attorney agree, we will be happy to either participate in or to host the conference.

ORDER RESTRAINING ENFORCEMENT OF "BARMAID ORDINANCE"

(Superintendent of Police—M. S. J.—January 27, 1970)

Enclosed is an order entered this day by the Honorable James B. Parsons, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, in the above captioned case. The order entered by the Court enjoins the Mayor, Richard J. Daley, as Local Liquor Control Commissioner of

the City of Chicago, Richard L. Curry, Acting Corporation Counsel, and James B. Conlisk, Jr., Superintendent of Police, their agents, attorneys, and successors in office from enforcing in any way certain provisions of Section 147-15 of the Chicago Municipal Code commonly known as the barmaid ordinance. This order is effective immediately and will remain in effect for 10 days until February 6, 1970, or unless that order is reversed by the United States Court of Appeals.

We will keep you advised regarding an appeal of that order which this office is now preparing. In the meantime, it is our opinion that you are obliged to notify all police personnel to discontinue making arrests under that section but only insofar as that section relates to the prohibition of women mixing or pouring alcoholic beverages. You may continue to enforce all other provisions in that ordinance.

POSSESSION OF BURGLARY TOOLS—INTENT

(City Council—R. F. F., M. E. A.—March 25, 1970)

On March 24, 1970, the Illinois Supreme Court rendered an opinion reversing the Circuit Court of Cook County, which had found the defendants guilty of possession of burglary tools.

On appeal to the Illinois Supreme Court, the defendants contended that the Chicago ordinance under which they were convicted (Municipal Code, Section 193-10) was not constitutional.

The Supreme Court of Illinois reversed the conviction, holding that intent was an essential element of the offense. But since the ordinance did not expressly make intent an element of the offense, the ordinance made it possible for a defendant to be convicted without proof of that essential element.

POSSIBLE CONFLICT BETWEEN THE STATE & CITY CURFEW REGULATIONS

(Superintendent of Police—R. F. F.—February 20, 1973)

This is in response to your letter of January 12, 1973, concerning a possible conflict between the state and city curfew regulations.

Section 1 of The State Curfew Law, An Act relating to curfew for certain children (Ill. Rev. Stat., 1971, ch. 23 par. 2371) applies to persons under the age of eighteen. The hours of the state curfew are:

12:01 a.m. to 6:00 a.m. Saturday and Sunday; 11:00 p.m. Sunday through Thursday to 6:00 a.m. of the following day.

The second section of the curfew act (par. 2372) allows "county, municipal or other local boards [to] . . . exercise legislative or regulatory authority over this subject matter by ordinance . . . increasing the requirements or otherwise not in conflict with this Act."

The Chicago curfew ordinance (Municipal Code of Chicago, section 190-2) increases the requirements for persons under seventeen. The hours of the Chicago curfew are:

11:30 p.m. Friday and Saturday until 6:00 a.m. Saturday and Sunday;

10:30 p.m.—6:00 a.m. any other day of the week.

In summary, the state curfew requirements apply to all children under eighteen years old, while the Chicago ordinance provides a curfew one half hour longer than the state curfew for persons under the age of seventeen. The Chicago city curfew does not conflict with the state curfew law because the city ordinance acts to increase the curfew requirements of the state law.

CITY OF CHICAGO v. *KARL MEYER*

(City Council—J. J. G. & M. E. A.—December 2, 1969)

On November 26, 1969, the Illinois Supreme Court rendered an Opinion affirming a judgment of the Circuit Court finding that the defendant had violated Section 11-23 of the Municipal Code of Chicago (Interfering with a Police Officer in the Discharge of his Duty). Based on the facts the Supreme Court reversed the judgment of the Circuit Court that the defendant violated Section 193-1 of the Municipal Code of Chicago (Disorderly Conduct).

The defendant was charged and found guilty of disorderly conduct and interfering with a police officer in the discharge of his duties under Chapters 193-1 and 11-33, respectively, of the Municipal Code of Chicago. He was fined $200 on the first charge and $100 on the second charge.

The defendant appealed both convictions charging that both ordinances were unconstitutional on their face, and that neither could be applied to the conduct of the defendant.

The Illinois Supreme Court in discussing the challenge made by the defendant that both ordinances are unconstitutional on their face stated (Opinion p. 2):

> ". . . This same challenge was leveled at this disorderly conduct ordinance in *City of Chicago* v. *Gregory*, 39 Ill. 2d 47, and at this resisting or interfering ordinance in *City of Chicago* v. *Lawrence*, 42 Ill. 2d 460, and we rejected the challenge in each case."

The Supreme Court discussed the issue of whether the ordinances can be constitutionally applied to a given fact situation. The Court said that even though the United States Supreme Court reversed the Gregory case, it neither approved nor disapproved of our conclusion that the police may order the cessation of otherwise lawful conduct where they have made all reasonable efforts to maintain order, but the conduct is producing an imminent threat of uncontrollable violence or riot. The opinion stated (p. 2):

> ". . . We adhere to the view expressed in our *Gregory* opinion that they may make such an order and that the demonstrators or speakers may be arrested and prosecuted for failure to obey such an order."

The Court reversed the disorderly conduct conviction because it was subject to the same criticism the United States Supreme Court made in *Gregory*. The facts reflected that the defendant was charged and convicted for disorderly conduct because of the manner in which he conducted his "forum". However, the Illinois Supreme Court affirmed the judgment of the Circuit Court that the defendant had violated Section 11-33 of the Municipal Code of Chicago.

CONSTITUTIONALITY OF CHICAGO'S DISORDERLY CONDUCT ORDINANCE

(Superintendent of Police—R. J. E.—March 18, 1968)

Please be advised that on March 18, 1968, the Honorable Hubert L. Will, Judge of the United States District Court, Northern District of Illinois, Eastern Division, entered an injunction in the above entitled cause pursuant to an opinion rendered by him on March 4, 1968, declaring unconstitutional Chapter 193, Section 1 of the Municipal Code of the City of Chicago entitled "Disorderly Conduct". and Chapter 11, Section 33 of the Municipal Code of the City of Chicago entitled "Resisting Arrest". This injunction is effective at 12:01 A.M., Wednesday, March 20, 1968, and enjoins the Superintendent of Police of the City of Chicago, and his agents, after that time from effecting any arrests or instituting any new prosecutions under either ordinance.

Please be further advised that Chapter 38, Section 26-1(a)(1) of the Illinois Revised Statutes, entitled "Disorderly Conduct", can be invoked under appropriate facts and circumstances in lieu of Chapter 193, Section 1 of the Municipal Code of the City of Chicago, and that Chapter 38, Section 31-1 of the Illinois Revised Statutes entitled "Resisting or Obstructing a Peace Officer" can be invoked under appropriate facts and circumstances in lieu of Chapter 11, Section 33 of the Municipal Code of the City of Chicago.

This injunction will remain in effect pending further orders pursuant to this litigation of which you will be duly notified.

RETENTION PERIOD FOR EVIDENCE AND RECOVERED PROPERTY RECORDS

(Superintendent of Police—S. R. D.—September 29, 1969)

We acknowledge receipt of your recent communication stating that as a result of a study, members of your staff have recommended "that Property Inventory Forms (CPD-23.598) be destroyed 3 years after property disposal." You state that the Property Inventory Form is a record prepared upon recovery of property or the taking into custody of evidence by the Department. You further state that the prepared forms are retained in 'live' files until "the corresponding property disposal is authorized and completed"; that "upon disposal of the evidence or recovered property, the corresponding property inventory forms are transferred to a 'dead' file where the current retention period is 20 years"; and that the Department wishes to reduce the period of retention from 20 years to 3 years.

You request our opinion "in regard to the proposed reduction [to 3 years] on the retention period for evidence and recovered property records".

It is clear from your communication that in each instance the property described in Property Inventory Form CPD-23.598 has either been returned to the individual legally claiming the same or has been destroyed, so that said property is no longer in the possession of the Department; and that your inquiry pertains merely to the length of time the form should be retained in your 'dead' file. Under such circumstances, the retention of the Property Inventory Form CPD-23.598 is merely for probable future reference by the members of the Department as to the disposition of the property set forth in the form.

Section 15 of the Limitations Act (Ill. Rev. Stat. 1967, ch. 83, par. 16) provides in part as follows:

> "[A]ctions * * * to recover the possession of personal property or damages for the retention or conversion thereof, * * * shall be commenced within 5 years next after the cause of action accrued."

In light of the foregoing, a suit for the wrongful retention or disposal of personal property by the Department of Police would be barred five years after the disposition of the legal proceedings which involved the personal property listed in Form CPD-23.598.

In light of the foregoing, it is our opinion that it would be advisable to retain Property Inventory Form CPD-23.598 at least five years after the same has been placed in the Department's 'dead' file.

POST CONVICTION PROPERTY RETENTION

(Superintendent of Police—M. E. A.—July 20, 1970)

This is in answer to your letter of April 14, 1970 requesting our opinion regarding your proposed property retention schedule.

The retention schedule as presently constituted would not encounter any

serious legal difficulties. However, four modifications in retention schedule may be advantageous.

1. Section A, "Post Conviction Property," adequately comports with the requirements of Ill. Rev. Stat., 1969, ch. 38, sec. 122-1 which allows a post-conviction petition for rehearing up to 20 years after the initial conviction. While the retention schedule indicates that evidence will be kept only where retrial is "likely", it may be advisable to further limit evidence retained for a post-conviction hearing to evidence relevant to a dispute of a material fact. Evidence which is not involved in such a dispute could be disposed of after the court proceedings. Moreover, even if evidence which would be relevant in a post-conviction rehearing was destroyed according to an established disposal schedule, the petitioner would have the burden of showing that the evidence would have been a substantial factor in overturning his previous conviction. The U.S. Supreme Court has held that "a State may make pursuance of the remedy conditional on the defendant's first showing the substantiality of his claim to the satisfaction of the Appellate Court." *Hysler* v. *Florida,* 86 Law. Ed. 932, (1941).

2. In regard to nonevidentiary property, sections D-2 and 3, E, F-3, G-1 and G-2, of the retention schedule call for the disposal of property either "according to law" or after 30 days notice.

The courts have established two due process requirements on confiscated property, "notice and opportunity to be heard in the protection and enforcement of one's right before a court of competent jurisdiction in an orderly proceeding adapted to the nature of the case." *U.S.* v. *Spallo,* 48 Fed. 2d 891 (D.C. Mo. 1931); *People* v. *Lavendowski,* 329 Ill. 22, 228 (1928). Furthermore Chicago Municipal Ordinance, section 11-17, states that the rightful owner must claim his property seized by the police within 30 days from the final disposition of the court proceedings. In case there are no court proceedings the owner must claim the property within 30 days from the date of seizure by police. Thus, based on case law and the municipal ordinance, the provisions of the retention schedule are appropriate, if the phrase "according to law" in the retention schedule includes notice to the rightful owner of the property and, if necessary, a judicial proceeding to determine ownership.

However, there are at least three exceptions to the necessity for notice and judicial proceedings.

First, police may dispose of items by summary abatement where "the thing is immediately dangerous to the safety or offensive to the morals of the community, and is incapable of being put to lawful use by the owner." This includes rotten food, infected items, mad dogs, diseased animals, counterfeit money and dangerous structures. *People* v. *Marquis,* 291 Ill. 121, 129 (1920).

A second exception is presented in the special provisions of Ill. Rev. Stat. 1969, ch. 38, sec. 108-12, which deals with provisions for distributing allegedly obscene materials to the rightful owner.

The third exception appears in the Chicago Municipal Code, sec. 11-20, which specifies that guns and other dangerous weapons may be disposed of 6 months after being seized by police.

3. In sections B-1 and B-2 the storage of items is dated from the date on which a warrant for the particular crime is issued. In Section C, bond forfeiture, the time of storage is measured from the date of *capias.* While these designated time periods comport with the statute of limitations, they should be measured from the date of the commission of the crime, whenever that date is determinable, rather than the date of the warrant or *capias.* Ill. Rev. Stat., 1969, ch. 38, sec. 3-5. Measuring the time of storage from the date of the commission of the crime should allow storage for a shorter duration.

4. Although sections B-1, B-2, C, D-2 and D-3, strive to conform to the statute of limitations as presently written, they may not always do so. Even though the time period enumerated by the statute of limitations has expired, it would be advisable to consult with the investigation officer of the case for which

the items are being retained. The mere lapse of the amount of time specified in the statute of limitations does not mean that the statute of limitations has run. For example, the statute of limitations may not have expired because the defendant is not "publicly resident in the State." Ill. Rev. Stat., 1969, ch. 38, sec. 3-7(a). Especially in the bond forfeiture cases under section C, it is unlikely that the suspect will be "publicly resident in the State." Likewise, in cases where a warrant has been issued, sections B-1 and B-2, the statute of limitations may be tolled. If a warrant has been issued, an information or indictment may also have been issued and thus "a prosecution would be pending against the defendant under Ill. Rev. Stat., 1969, ch. 38, sec. 3-7(c).

ADMISSIBILITY OF PHOTOGRAPHIC COPIES OF FINGERPRINT CARDS

(Director of Planning, Department of Police—R. F. F., M. E. A.—April 21, 1970)

This is in answer to your letter of April 13, 1970 in which you inquire about the admissibility of photographic copies of fingerprint cards. You stated that it is your plan to keep the original initial hard fingerprint card, but to destroy subsequent fingerprint cards one or two years after they are made to save storage space, preserving microfilm copies.

The original fingerprint cards in the files of the police department may not in any case be used to prove a prior conviction. Prior conviction may be proved by a photographic copy of fingerprints supplied by the warden of a penal institution accompanied by his certificate stating that he had possession of the person involved and that the copy is a true reproduction of the prisoner's fingerprints which are on file with him.

In order to prove the identity of a defendant it is, of course, best to submit an original fingerprint card. Under your plan the initial original fingerprint card will always be available. Nevertheless, if for some reason an original fingerprint card is not available, a photographic copy will be acceptable. Although the "best evidence rule" states that secondary evidence (photographic copies) will not be admissible if the proponent destroys the original, under the present circumstances the destruction of the original by the police department was not for the purposes of preventing the original's introduction at trial. In such a case the photographic copy is admissible. In any case, the defendant's fingerprints may be taken again to compare them with the questioned prints.

Thus, your plan to keep microfilm copies of subsequent fingerprint cards is justified from a legal standpoint.

NAME CHECK ARREST INFORMATION FOR NON-LAW ENFORCEMENT

(Superintendent of Police—E. H.—September 14, 1971)

Reference is made to your letters of April 29, 1971 and June 28, 1971, in which you request our opinion as to the three following questions:

(1) Can the Police Department disclose information through a name check pertaining to arrest records of individuals when such requests are made by persons other than for law enforcement purposes—specifically by prospective or present employers and their personnel and security departments?

(2) Could the Police Department become a potential defendant in a civil rights action or other court action involving possible liability if a determination is made to provide name check arrest information to persons other than for law enforcement purposes?

(3) Is legislation required by the Illinois General Assembly which would authorize the Department to disseminate name check information to persons other than law enforcement agencies, assuming that the Department is prohibited under existing law from giving out such information to the public?

Your letter states that in St. Louis and Cleveland it is the practice of the police departments to release arrest information to private employers, subject to certain conditions. These practices and conditions will be discussed later in this letter. Your letter further states that it has been and still is the policy of the Police Department that all its records are regarded as confidential and privileged and not subject to public disclosure, except pursuant to a proper court order, which the Department customarily resists insofar as possible, and except for certain traffic accident records, which are public records, copies of which are available to anyone on payment of a nominal fee. *Department Special Order 64-17* (Jan. 20, 1969). This Special Order specifically provides:

"C. Arrest information will not be released to arrested persons or the general public. Dept. Rules 4 & 39."

The present practice of the Chicago Police Department is well within the law.

The right of privacy of the person arrested is affected by dissemination of his arrest record. The leading case of *Kolb* v. *O'Connor,* 42 Ill. App. 2d 410 (1963), recognized this while holding that the needs of law enforcement dictate that fingerprints, photographs and such identification records of persons arrested may be retained in the files of the police for the limited purpose of exhibiting them to victims of subsequent crimes in order to enable them to make identifications. *Kolb* balanced the individual's right of privacy against the public's right to safety by means of effective law enforcement and found that the individual's right must be subordinated. But in the questions before us, there is no public right involved. The individual's right of privacy must therefore prevail.

Illinois has recognized the right of privacy for many years. *Eick* v. *Perk Dog Food Co.,* 347 Ill. App. 292 (1952). The new Illinois Constitution, has raised the right of privacy to the state constitutional level by providing in Article I, Section 6:

"The people shall have the right to be secure in their persons . . . against . . . invasions of privacy."

The right of privacy has long been recognized by the overwhelming majority of American states. Prosser, *Privacy,* 48 Calif. L.Rev. 383 (1960).

The United States Supreme Court has acknowledged the right of privacy, under certain circumstances, to be of federal constitutional dimension. *Griswold* v. *Connecticut,* 381 U.S. 479 (1955).

Thus, an abuse of privacy in connection with arrest records may amount to an actionable deprivation of constitutional rights subject to the sanctions of the federal Civil Rights Act. 42 U.S. Code § 1983. See *Gregory* v. *Litton Systems, Inc.,* 316 F.Supp. 401 (DC,CD,Calif., 1970); *Morrow* v. *District of Columbia,* DC Cir., 1969, 417 F.2d 728, *United States* v. *Kalish,* 271 F.Supp. 968 (DC, PR, 1967); *Menard* v. *Mitchell,* DC Cir., 1970, 430 F.2d 486; *on remand,* DC, DC, Civil Action No. 29-68, slip opinion (June 15, 1971).

An exception is found in the permissible practice of furnishing arrest information to the press and other news media. Thus used, arrest records are deemed to be primarily a recording of actions taken by the police. *Opinions of the Corporation Counsel,* vol. 25, pp. 40, 41 (Aug. 9, 1965).

Although the disclosure of arrest records to employers has been held to violate the right of privacy, e.g., *Menard* v. *Mitchell,* No. 39-68 (D.D.C. June 15, 1971) (slipsheet op.), where arrest records are released to the news media First Amendment interests are involved and the courts are unlikely to hold that a privacy right has been violated.

Public discussion of the official actions of public officials and public servants is constitutionally privileged. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). That a private individual, arrested, but later acquitted or released without conviction, finds himself exposed to damaging publicity is a misfortune for which he is without remedy because of the overriding social interest in scrutiny of official conduct. *Rosenbloom* v. *Metromedia,* U.S. , 29 L.ed 2d 296 (June 7, 1971). Yet abuse of even this privilege can be actionable. *Annerino* v. *Dell Publishing Co.,* 17 Ill. App. 2d 205 (1958).

In any event, for private employers arrest records are not memoranda of police activities, but instruments of identification.

Arrest records by name check only are often very unsatisfactory. Because of the large number of common names, accompanying fingerprint records are often necessary to make arrest records clearly identifiable. Arrest records, even of the F.B.I., have in the past seldom been corrected to show acquittals and dismissals of charges. *Menard* v. *Mitchell,* DC, DC, Civil Action No. 39-68 (1971). Yet where there has been an acquittal or dismissal of charges, and the arrest record has not been corrected to show it, the arrest record is tantamount in its effect to conviction without trial and may well constitute a denial of due process.

Since last year, we have had in Illinois a procedure for expunging arrest records of arrests for violation of a municipal ordinance or a misdemeanor, if the arrestee is acquitted or released without being convicted—provided the arrestee has not previously been convicted of any criminal offense or municipal ordinance violation. Ill. Rev. Stat. 1970 Supp. ch. 38, § 206-5.

On August 30, 1971, the Governor approved an act which permits, more generally, viz., including felony arrests, an arrest record to be expunged if the person is not convicted. Experience will clarify the workings and efficacy of the new measure.

Nevertheless, the new law will serve, to some extent, to bring Illinois practice with respect to arrest records into partial conformity with the federal Fair Credit Reporting Act, enacted in 1970, and now forming Title Six of the Consumer Credit Protection Act (15 U.S.C. §§ 1681-1681s) by providing a means of correcting arrest records where there has not been a conviction. This new federal law has a direct impact on the propriety of furnishing arrest reports to private employers.

The act undertakes to regulate "consumer reporting agencies." "Consumer reports" are defined by the act to include arrest records furnished for the purpose of serving as a factor in establishing an individual's eligibility for employment or for promotion, reassignment or retention as an employee. "Consumer reporting agencies" are defined to include any person, corporation, association or institution, including governmental agencies, which for fees, dues or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling consumer reports and which uses any means or facility of interstate commerce—viz., the mails or the telephone—to prepare or furnish such reports.

Section 1681a, however, excludes from the meaning of the term "consumer report" "any report containing information solely as to transactions or experiences between the consumer and the person making the report." This exception seemingly is susceptible of being interpreted as eliminating from the scope of the Act arrest reports furnished by a police department if the reports report only arrests that particular police department itself makes and do not report arrests made by other law enforcement agencies on which it has data.

The new federal law requires every "consumer reporting agency" within its coverage to disclose its file to the individual reported on and to provide him with means to have mistakes and omissions corrected. Subject to these safeguards, the act permits furnishing a report for employment purposes "in accordance with the written instructions of the consumer to whom it relates." Strong civil and criminal enforcement provisions are contained in the act.

The procedures followed by the police departments of St. Louis and Cleveland in furnishing arrest records to private employers appear to be in partial conformity with relevant laws. In both cities disclosure is conditioned upon the written consent of the individual whose arrest record is requested. The St. Louis procedure also provides that "arrest record information not indicating a conviction or warrant issued will not be released to the individual or employer unless five or more arrests have occurred in the most recent ten (10) years in which case the entire record will be released."

Neither the St. Louis nor Cleveland procedures appear to provide means for correcting inaccuracies or incompleteness in an arrest record. The Cleveland system, however, is limited to reports of arrests made in the city of Cleveland and, therefore, it does not seem to be subject to the new federal statute.

The St. Louis and Cleveland systems provide only partial models. There should be provision for disclosure of the record to the individual reported on and provision for correction of errors and omissions.

Even if arrest records furnished priviate employers were limited to arrests made by the Chicago Police Department, furnishing such records to private employers could render the City liable to civil suits for invasion of privacy, unless the individual whose arrest record is being divulged consents to the disclosure. This situation probably cannot be changed by legislation, since the right involved, the right of privacy, has been held to be of constitutional dimension.

If, however, the practice of requiring employees and job applicants to furnish arrest information were to become widespread, the consents obtained might cease to be voluntary. In that event, employers and police officials would be likely to find themselves subject to federal Civil Rights Act suits claiming infringement of the constitutional right of privacy.

The disclosure of arrest records to private employers appears to be falling into growing disfavor. A new Illinois statute, not yet approved by the Governor, prohibits "any employer, employment agency or labor organization to inquire *on a written application* whether a job applicant has ever been arrested." (Emphasis supplied.) S.B. 1085, as amended, 77th G.A., 1971.

Whether to disseminate arrest records to private employers, even with all necessary legal safeguards installed, is a policy decision. The legitimate interest of employers in safeguarding their property must be weighed against the individual's right of privacy, the unsatisfactory nature of arrest records and the burden such a practice would impose upon the Police Department.

I. R. S. DEMAND FOR CERTAIN MONIES HELD BY POLICE DEPARTMENT

(Legal Coordinator, Department of Police—H. N. L.—February 6, 1973)

This letter is in reply to your letter of December 18, 1972, requesting an opinion regarding the obligation of the Police Department to comply with the Internal Revenue Service demand for a certain $1,404.00 held by the Police Department under Department Property Inventory numbers 903453 and 903456.

Section 6332 of the Internal Revenue Code provides that any person in possession of property which is subject to levy and upon which a levy has been made shall surrender that property to the Secretary of the Treasury or his delegates. There are several exceptions to this, however, those exceptions do not apply in this case. (See: Internal Revenue Code Section 6334). The word "person" in this section would include not only an individual person but any corporation, state, or political sub-division. *Sims* v. *United States,* 359 U.S. 108, (1959). The federal tax regulations indicate that the demand may be made by the District Director (of Internal Revenue) and that he has the right to receive such property at the time of such demand subject to any attachment or execution

under any judicial process. Due to the fact that in this case the property is not subject to either an attachment or an execution, the District Director has a right to the money.

We have been informed that the procedure of the Internal Revenue in a case such as ours, is that the Internal Revenue will not demand immediate delivery of the money where the money is being held by a local authority as evidence in a pending case. The Internal Revenue must be advised of the situation by addressing a letter to Mr. Gow, Special Procedure Staff, Internal Revenue Service, 17 North Dearborn Street, Chicago, Illinois 60602. This letter should (1) acknowledge that the Internal Revenue Service has a claim to the money and (2) that the money is being held for purposes of evidence in a case and it will be delivered to the Internal Revenue Service after the disposition of that case. Although this procedure is not formally recognized in any regulations, we are under the impression that this is a common occurrence.

CRIMINAL OFFENSE OF INTIMIDATION

(Executive Director, Commission on Youth Welfare—M. E. A.—December 27, 1968)

Reference is made to your letter of December 19, 1968 in which you inquire as to the criminal offense of intimidation.

Please be advised that Ill. Rev. Stat. 1967, Ch. 38, §12-6 provides as follows:

"(a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:

(1) Inflict physical harm on the person threatened or any other person or on property; or

(2) Subject any person to physical confinement or restraint; or

(3) Commit any criminal offense; or

(4) Accuse any person of an offense; or

(5) Expose any person to hatred, contempt or ridicule; or

(6) Take action as a public official against anyone or anything, or withhold official action, or cause such action or withholding; or

(7) Bring about or continue a strike, boycott or other collective action.

(b) Penalty

A person convicted of intimidation shall be fined not to exceed $5,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to five years, or both fined and imprisoned."

The Comments of the Committee which drafted the above provision (which was enacted in 1961) reads as follows:

"This section defines and prohibits as intimidation a wide range of acts and conduct previously proscribed in less identifiable form in chapter 38, §§ 376-383. The use of force or threat to obtain a confession, statement or information regarding any offense is pulled out of the intimidation category and dealt with separately in section 12-7 as a separate offense. This was deemed desirable by the Committee because of the special circumstances which usually surround the obtaining of information regarding criminal offenses, which circumstances are not common ordinarily to other situations or intimidation. Note that intimidation requires a specific intent to cause another to perform 'or to omit' the performance of any action (such as testifying), and the threat must be 'communicated' with that intent. It is also required that the act threatened, if performed, would be 'without lawful

authority.' The section anticipates, therefore, that the accused is apprehended and prosecuted for intimidation before the harm threatened is performed. The penalty is relatively light. If the threatened harm has been performed also, then the accused is probably subject to prosecution and punishment for the more serious offense, or both intimidation and such offense."

JURISDICTION OF LOCAL POLICE TO BOARD MERCHANT VESSELS

(Superintendent of Police—R. F. F., M. E. A.—May 23, 1969)

This is in answer to your letter of 22 April 1969, inquiring about the authority of Chicago police to board vessels docked at the Calumet Harbor and Navy Pier.

This letter concerns solely merchant vessels of American and foreign registry, docked at Chicago piers and harbors. The law regarding jurisdiction of local police to board American and foreign military vessels which often dock at Chicago piers and harbors, is different in many instances from the law governing civilian vessels.

The general principle is that foreign merchant vessels entering the waters of the United States submit themselves to American law and jurisdiction for most purposes. This has long been the law in the United States.

> "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country." *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138, 142 (1957).

See also Wildenhus' Case, 120 U.S. 1 (1886).

Applying this principle, American law takes cognizance of all crimes committed by foreign crews on shore and of some crimes committed by foreign crews aboard their vessels. If activities aboard ship have a shoreside effect, American law has jurisdiction. However, if activities aboard a foreign vessel pertain to that ship only, such as matters of crew discipline, local police may not interfere. The United States Supreme Court has stated it this way:

> "And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority." *Wildenhus' Case* 120 U.S. at 12 (1886).

It is not always clear what events occurring on board affect the "peace and tranquility" of the port. No doubt fights among crew members or crew disputes with the master of the vessel are not within local jurisdiction. However, *Wildenhus* held that American courts had jurisdiction over a murder occurring on board a foreign vessel.

A foreign vessel is not to be considered a piece of foreign territory, immune from local jurisdiction. Vessels, both foreign and American, may be treated like other private property. Therefore, searches and arrests may be made aboard vessels in the same manner as they may be made on other private property. As with other private property, a vessel within local jurisdiction may not be searched unless there is probable cause to do so. *United States* v. *Coppolo,* 2 F. Supp. 115. (D.C., N.J., 1932); *United States* v. *Powers,* 1 F. Supp. 458 (D.C., E.D., N.Y. 1932).

Section 107-2 of the Illinois Code of Criminal Procedure of 1963 provides:

"A peace officer may arrest a person when:

(a) He has a warrant commanding that such person be arrested; or

(b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this state or in another jurisdiction; or

(c) He has reasonable grounds to believe that the person is committing or has committed an offense."

Thus, a search of or an arrest aboard a Chicago docked merchant vessel may be made under warrant or when an officer has reasonable grounds to believe a crime has been or is being committed thereon.

An officer does not need a warrant or probable cause in order to board ship to make a search or effect an arrest when the police are invited to investigate crimes or apprehend criminals on board ship. Such invitation or consent may be given by the master, the owner, or other person who has the authority to do so.

The following are answers to your specific questions:

1. Do Chicago police have authority to board ships for the purpose of inspection of the ship's manifest to make certain that cargo as described in the manifest actually is aboard the ship?

Without the necessity of probable cause or with the authority of a warrant, certain federal officers may board ship for the sole purpose of inspecting the manifest.

"A government officer has the right to board a vessel to inspect the manifest and observe the cargo [printed thereon], and if, from this investigation, it is apparent that a crime is being committed in his presence, by reason of what he can see, or by reason of the failure of the master to produce a manifest, or an incomplete or improper manifest, or other apparent violation of the navigation or revenue laws, he would have the right to arrest the offender and seize and search the vessel." *United States* v. *Coppolo,* 2 F. Supp. 115, 116 (D.C. N.J., 1932).

Absent state statute, city ordinance or lawful rule or regulation of the Chicago Regional Port District expressly authorizing the inspection of a ship's manifest, a Chicago police officer could only do so with permission of the master, incident to the execution of a search warrant or pursuant to a search incident to a lawful arrest.

2. Do Chicago policemen have authority to board ships for the purpose of inspection of personnel attached to a ship to determine if said personnel possess any countraband concealed on their person?

Police have such authority only if they have an invitation to do so from the master of the vessel, a search or arrest warrant, or reasonable grounds to believe a crime is being or has been committed.

3. Do Chicago policemen have authority to board the vessels for the purpose of effecting the arrest for a crime committed on ships by a seaman who may be attached to said ship or longshoreman employed in or near the dock areas?

They have such jurisdiction if they have an invitation from the master, a search or arrest warrant, or reasonable grounds to believe a crime has been or is being committed.

4. Do Chicago policemen have authority to pursue a foreign or American seaman or longshoreman from land onto the ship pursuant to interrogation or arrest or both for a criminal offense?

The police may board a ship on invitation, with an arrest or search warrant, or upon reasonable grounds to believe a crime is being or has been committed. Therefore, if an officer has an arrest warrant or reasonable grounds to believe the fleeing suspect has committed or is commiting a crime, he may pursue him from land on board ship and effect an arrest there.

HANDLING PERSONS IN APPARENT NEED OF MENTAL TREATMENT

(Superintendent of Police—F. G. S.—April 17, 1973)

Your letter of March 19, 1973, addressed to Richard L. Curry, Corporation Counsel, together with the attached documents relating to the handling of persons in apparent need of mental treatment, in particular, pursuant to provisions of Chapter 91½, Section 7-1 et seq., Ill. Rev. Stats., 1971, which pertain to emergency admission, has been referred to the undersigned for attention and reply.

We have reviewed your proposed draft revision of General Order 70-9, identified currently as No. 73, with particular reference to the proposed changes therein and with special attention to your proposed change of Section IV, Necessary Emergency Admittance Forms.

It is our opinion that your proposed new order 70-9, Handling Persons In Need Of Mental Treatment meets the necessary requirements of form and legality in full compliance with Chapter 91½, Section 7-1 et seq., Ill. Rev. Stats., 1971. Your proposed new wording of Section IV A clearly indicates that every effort should be made initially to secure the signature of a spouse, next of kin, guardian or friend, as well as witnesses on the Petition For Hospitalization Form, State of Illinois (68-MHC-7) and only if such signature cannot be obtained shall the form be signed by the officer in charge of the squadrol or by the officer who transports a person in need of mental treatment. This procedure together with the provision of Chapter 91½, Section 12-12, Ill. Rev. Stats., 1971. Absolution From Liability, contained in II D of your revised order, would relieve from any liability, any officer acting in good faith pursuant to this order in executing the Petition For Hospitalization Form.

It is our further opinion that the form entitled "Petition For Hospitalization, State of Illinois 68-MHC-7 should not be deemed irregular or improper and that compliance by Police Department Personnel with your proposed revised General Order No. 70-9 provides the necessary safeguards in dealing with this problem without jeopardizing the integrity of Department Personnel who may become involved in these sensitive situations.

MINOR—DEFINITION

(Superintendent of Police—R. F. F.—May 11, 1972)

This is in response to your letter requesting clarification of the current legal meaning of the term "minor."

Where a definite age is specified within the language of a statute or ordinance, that age controls for the purposes of that statute or ordinance. However, where the term "minor" is used within the language of a statute or ordinance without an age being specified, section 131 of the Probate Act (Ch. 3, par. 131, Ill. Rev. Stat. 1971) will control. It reads as follows:

> "Persons of the age of 18 shall be considered of legal age for all purposes, except that of the Illinois Uniform Gifts to Minors Act, and until this age is attained, they shall be considered minors."

This statute has application beyond the limitations of the Probate Act. The courts have applied it in deciding questions of infancy in other areas, such as the signing of contracts and the appointment of agents. Thus, unless otherwise specified by statute or ordinance, a person reaches his majority on his eighteenth birthday.

Ordinarily, where the term "minor" is used within the language of an ordinance in the Municipal Code of the City of Chicago and no age is specified, section 131 of the Probate Act will control. However, in some cases another

provision of the state statutes will act to raise the age of reaching majority for certain purposes. This is particularly true in the case of laws regulating alcoholic beverages. For instance, the Chicago Municipal Code (Sec. 147-14) forbids the sale of liquor to "minor," with no age specified. In this instance, ch. 3, section 131 of the Ill. Rev. Stat.—which would ordinarily control—is superseded by the specific provisions limiting the sale of liquor to minors of Art. VI, Section 12 of the Liquor Control Act, (Ill. Rev. Stat. 1971, Ch. 43, par. 131), which states:

> "No licensee . . . shall sell, give, or deliver any alcoholic liquor to any person under the age of 21 years."

In addition, by implication, no person may become a licensee unless he has reached 21 years of age.

In reference to your question with respect to "minor" as defined by the Juvenile Court Act (ch. 37, par. 701-1 *et seq.*, Ill. Rev. Stat. 1971), although section 1-13 defines minor as a person who has not yet reached the age of 21, it appears from the language of sections 2-2 to 2-5 that the Act deals only with those persons who have not yet reached their eighteenth year (or, in some instances, only with boys who are not yet seventeen).

To summarize, for the purpose of statutes or ordinances not specifying a different age, a minor is a person not yet eighteen. In certain instances, particularly where liquor is concerned, statutes may specify that majority is not reached until the twenty-first year.

LEGALITY OF SEIZURE OF OBSCENE MATERIALS

(Superintendent of Police—R. F. F., M. E. A.—August 11, 1970)

This is in answer to your letter of August 6, 1970, inquiring into the legality of the seizure of obscene materials. We reaffirm the opinion in our letter of February 6, 1970 stating that obscene books and movies may not be seized without a prior adversary hearing.

That opinion was based upon decisions of the Supreme Court, including *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964) and *Marcus* v. *Search Warrants of Property,* 367 U.S. 717 (1961), holding that since books and magazines are of a different character than narcotics, gambling paraphanelia, and other contraband, before the police may seize allegedly obscene matter, their obscenity must be tested in an adversary hearing. Although there are apparently a few decisions in the lower Federal Courts around the country that hold otherwise, we are bound by the opinion of the United States Court of Appeals for the Seventh Circuit, *Metzger* v. *Pearcy,* 393 F.2d 202 (1968), which follows *Quantity of Books* and *Marcus.*

It should be noted however, that these decisions do not prevent the initiation of prosecution against those individuals who sell obscene material or who show obscene movies, provided that the dissemination of such materials is not halted prior to an adversary hearing.

POLICE PROTECTION IN PRIVATE PARKS

(O. M. & S.—D.P.—March 8, 1968)

Your recent letter to Raymond F. Simon, Corporation Counsel, discusses the possibility of obtaining city police protection with respect to the unauthorized parking of automobiles in a privately dedicated park. Urging the propriety of such action, you cite in support of your view the Illinois Municipal Code, Ill. Rev. Stat. 1967, Chapter 24, paragraph 11-5-5, and the Municipal Code of Chicago, section 27-3-1 (which we assume refers to section 27-381).

While we have no objection to discussing the matter with you, we believe it proper to set out our views in writing for your benefit.

The statutory provision that you cite may be broad enough to authorize the action that you support; it has been implemented, however, only to the extent of providing the service described in chapter 27, section 27-381, which deals, by its terms, only with private parking lots. As you will note, even in this provision, only parking for tenants or employees is mentioned. That this provision is to be construed narrowly is indicated by the fact that it was thought necessary by the General Assembly to provide specific authority for city regulation of parking in the parking lots belonging to shopping centers, cf. Ill. Rev. Stat. 1967, ch. 24, par. 1-1-7, and ch. 95½, par. 123.1.

We conclude, therefore, that ordinance authority for your proposal is now lacking and that it will be necessary for such a matter to be considered and approved by the City Council. Accordingly, we suggest that the Madison Park Property Owners' Association seek the advice of the Honorable Claude W. B. Holman, Alderman of the Fourth Ward.

PROCEDURE IN SECURING AND RETURNING SEARCH WARRANTS

(Chief Justice of the Illinois Supreme Court—R. L. C.—January 11, 1973)

Your recent letter dated December 20, 1972, requests comment on a proposal that the Court adopt a rule establishing a system of docketing search warrants and making them available for public inspection. The proposal suggests that a system of accountability be established for search warrants in an effort to avoid abuses. This letter is in response to your request. Inasmuch as this office is the attorney for James B. Conlisk, Jr., Superintendent of Police of the City of Chicago, he has asked that we respond in his behalf as well.

Initially, it may be useful to describe briefly the system of obtaining and recording search warrants as now followed by the Chicago Police Department. Enclosed herewith is a copy of General Order No. 71-2, of the Circuit Court of Cook County, Procedure in Securing Search Warrants, issued by Presiding Judge Eugene L. Wachowski, First Municipal District. Also enclosed is a copy of the Chicago Police Department Special Order No. 72-29 issued by the Superintendent of Police. In sum, it is required that all search warrants that are obtained by the Chicago Police Department be returned to the clerk of the court of issuance within 20 days. A record of the issuance of each warrant is kept in a card file in the clerk's office. After the clerk has made a record of the warrant, the original search warrant is then returned to the Chicago Police Department where it is kept until charges are filed, at which time it becomes part of the court file. Until charges are filed, however, the warrants are not available for general inspection.

The gist of the complaint referred to in your letter seems to revolve around the practice of using an unidentified informer as the basis for issuance of a search warrant. As you know, neither the Illinois Supreme Court nor the Supreme Court of the United States has found a right to information respecting the identity of an informer. While there may be no right to such information, it is also clear that under certain circumstances such information may be made available, see, for example, *McCray* v. *Illinois,* 386 U.S. 300, 18 L.ed. 2d 62 (1967). The decision of the Court in *People* v. *Bak,* 45 Ill. 2d 140 (*per curiam* 1970) does not appear to be to the contrary. In addition to these cases, which provide rules relating to criminal procedure, it seems possible that the information relating to the identity of informers would also be available under rules of discovery applicable in civil matters including suits brought, for example, under 42 U.S.C. § 1983 (Civil Rights Act). It appears, therefore, that apart from the proposed rule an individual aggrieved by an abuse of the criminal process can obtain the necessary information to vindicate his rights. Insofar as the proposed rule seeks to make the information more accessible, the procedures that you

refer to, to the extent that they require docketing or recordation, are already in effect, at least in the City of Chicago. There would certainly be no objection to a rule that would codify those procedures.

We do feel, however, that any requirement that search warrants be made available for public inspection prior to the filing of charges be given further consideration. Two principal reasons support this request. First, public inspection of search warrants could jeopardize or expose to exploitation persons who may be involved as witnesses and informers or a policemen involved in undercover operations. Prevention of such a situation is, it would seem, the policy underlying the *McCray* and *Bak* decisions and is a valuable aid to effective law enforcement. But the second consideration is equally important: this concerns the right of privacy of individuals who are the subjects of search warrants. Under the current state of the law an interested individual, either as defendant or plaintiff, may have access to warrants upon showing of particularized need. Under the proposed rule it appears that the warrants will be available to indiscriminate public scrutiny. Individuals who have been subjected to a search warrant but who have not been charged with an offense are in a position similar, perhaps, to persons who are arrested but later discharged. Just as there is concern for the widespread dissemination of arrest records regardless of conviction, so should there be concern for the privacy of those who have been subjected to official investigation but not charged with a violation of law.

It would appear, therefore, that the present compromise which generally protects privacy and effective enforcement while at the same time allowing examination where a need is shown is, perhaps, as reasonable a solution as may be devised. To the extent that a proposed rule does not require revelation of an informer's identity, it would seem to violate privacy without appreciably strengthening the position of an injured person. If the rule would, in fact, permit disclosure of an informer's identity, it would clearly hamper law enforcement while invading privacy—and at the same time again fail to expand significantly an injured person's access to information beyond what is already available, as suggested above.

In consequence, we suggest that a rule codifying the present practice or a similar more expanded procedure might be considered useful; a proposal that would open all warrants to public inspection, however, raises sufficient question that it is believed it would be prudent to consider the matter more fully.

We hope that these views will be of use to the Court in considering the proposal under consideration. Both this office and the office of the Superintendent of Police of the City of Chicago will, of course, be pleased to supply such other information as you may require or to assist you in any other way the Court may desire.

UNMARKED POLICE VEHICLES, DO THEY CONFORM TO EXISTING LAW

(Superintendent of Police—S. S.—July 1, 1968)

Reference is made to your letter of June 3, 1968, in which you request an opinion regarding the use of unmarked police vehicles with both the siren and flashing inboard white headlights functioning during emergency conditions.

The sections of the Uniform Act Regulating Traffic on Highways discussed below have bearing upon this question.

Section 2 (Ill. Rev. Stat. 1967, ch. 95½, par. 99) provides in Subsection (d) that "police vehicles" are "authorized emergency vehicles." Therefore, any vehicle which the police department designates for its official emergency business would be an "authorized emergency vehicle." Consequently, the unmarked vehicles in question would qualify as "authorized emergency vehicles."

Section 22.01 (Ill. Rev. Stat. 1967, ch. 95½, par. 119.1) renders it illegal for the driver of a motor vehicle to flee or attempt to elude a police officer after the officer has given a "visual or audible signal" for the driver to stop. It is stated that "the signal given by the peace officer may be by hand, voice, siren, red or blue light." Since the prerequisites are listed in the disjunctive, the use of any one of them would be adequate, and, therefore, a blue light would not be necessary as long as a signal by either hand, voice or siren were given. However, this section also requires that "the officer giving such signal shall be in police uniform, and, if driving a vehicle such vehicle shall be marked showing it to be an official police vehicle." Since the vehicles in question are unmarked, this last element of the section could not be met, and, therefore, this section could not be utilized by the operator of an unmarked police vehicle.

Section 23 (Ill. Rev. Stat. 1967, ch. 95½, par. 120) exempts the driver of an "authorized emergency vehicle" from certain traffic laws "when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law. . . ." Since, under Section 2 of the UART, the unmarked vehicles in question are "authorized emergency vehicles," the exemption afforded by Section 23 would apply to the drivers thereof.

Section 53 (Ill. Rev. Stat. 1967, ch. 95½, par. 150) states that speed limits do not apply to an authorized emergency vehicle in motion when responding to an emergency call and when the driver thereof sounds an audible signal by siren, etc., as may be reasonably necessary. The unmarked vehicles in question could comply with that provision. However, the statute continues by stating that "police vehicles in cities with a population of more than 500,000 shall have in operation at least one lighted lamp displaying an oscillating, rotating, or flashing *blue* beam. . . ." (Emphasis added.) Since the vehicles in question woud not have a blue beam, the speed exemption afforded by Section 53 would not apply.

Section 72 (Ill. Rev. Stat. 1967, ch. 95½, par. 169) applies to "a police vehicle properly and lawfully making use of an audible or visual signal. . . ." Since the section states audible "or" visual, the sole use of a siren would qualify the vehicles in question.

Section 113.04 (Ill. Rev. Stat. 1967, ch. 95½, par. 210d) provides that "oscillating, rotating or flashing lights located on top of police vehicles in this State shall be lighted whenever a police officer is in pursuit of a violator of a traffic law or regulation." This section can be interpreted in one of two ways. The first is that *any* police vehicle in pursuit of a traffic violator must have a light functioning on its top. The second is that *if* the police vehicle is equipped with such light, then the light must be functioning. The first interpretation would prohibit the vehicles in question from pursuing traffic violators since they do not have top lights. The second interpretation would allow the vehicles in question to pursue traffic violators, since, under that interpretation, if the police vehicle has no top lights then the use of such lights is not required. The courts have never construed this section, and, consequently, it remains an open question. It is therefore recommended that a conservative approach be taken: the unmarked vehicles should be used to pursue traffic violators only in an extreme emergency.

In conclusion, there is no single answer which can be given to the question of whether the proposed police vehicles conform to existing laws. As stated above, the requisites of certain UART sections are met and the requisites of certain others are not. Each section must be treated separately.

INTOXICATION AND WAIVER OF RIGHTS

(Superintendent of Police—M. E. A.—January 16, 1969)

Reference is made to your letter of January 8, 1969, in which you ask the following question:

> "A perplexing question which we suggest is: May a person who is intoxicated intelligently waive his rights under the *Miranda* decision and, if

he can, at what point of intoxication may we assume arrestee cannot intelligently waive said rights?"

You also request that we review several "Alcoholic Influence Report" forms.

The following are our opinion:

(1) There are no legal impediments in your proposed "Alcoholic Influence Report" forms.

(2) A person who is intoxicated may not effectively waive his rights under the *Miranda* decision. If you wish to obtain a statement which will be admissible into evidence at a trial, the suspect should not be questioned until he is sober.

(3) The Illinois Supreme Court has recently held that it is not required to give the *Miranda* warnings before administering "Breathalyzer" or "Field Visual" tests. *People* v. *Mulack,* 40 Ill. 2d 429 (1968).

WAIVER OF COUNSEL AT THE "SHOW-UP"

(Director of Planning—M. E. A.—November 8, 1967)

Reference is made to your letter of October 18, 1967 in which you request our "comments" on your 4-page memorandum dated 9 October, 1967 pertaining to revised show-up procedures reflecting the following recent U.S. Supreme Court decisions: *Gilbert* v. *California,* 35 USLW 4614 (1967); *Stovall* v. *Denno,* 35 USLW 4610 (1967); *United States* v. *Wade,* 35 USLW 4597 (1967).

In section III A of your memorandum it is stated:

"If the criminally accused desires to waive his right to have counsel present at the show-up, it would appear to be acceptable to the court as long as he waived the right knowingly."

This proposal is accurate in light of the above cited cases. However, Annex "A" of your memorandum entitled "Conduct of the Show-Up", does not reflect this proposition of knowing waiver. Point III A of Annex "A" should be revised to reflect the proposition that if an accused does not have counsel, he must *knowingly* waive his right to counsel at the show-up before he is required to participate in the show-up. If he demands counsel, a reasonable time must be allowed to obtain the same.

RIGHT OF POLICE OFFICERS TO BE PROVIDED COUNSEL AT LINEUPS

(Superintendent of Police—G. F. H., W. R. Q.—October 29, 1971)

In response to your inquiry concerning the presence of counsel at lineups in which police personnel are participating, the present state of the law in Illinois requires that counsel be provided to all persons participating in post-indictment lineups unless such right is intelligently waived, but that the right to counsel is not required in pre-indictment lineups in this state.

Such is the holding of the Illinois Supreme Court in *People* v. *Palmer,* 41 Ill. 2d 571 (1969), in an opinion written by the former Justice Klingbiel. The Court held that while post-indictment lineups are a critical stage of the prosecution and require a right to the presence of counsel (citing *United States* v. *Wade,* 388 U.S. 218, and *Gilbert* v. *California,* 388 U.S. 263), pre-indictment lineups are not a critical stage of the prosecution and therefore the right to presence of counsel is not required.

However, the new provisions in Section 10-1-18.1 of Chapter 24 of the Illinois Revised Statutes 1969, which require the right to counsel of his choice when any police officer is involved in an investigation which may be the basis of charges seeking his removal or discharge, present another aspect of this question which must be considered in each individual case involving police personnel.

Therefore, as a matter of policy, the Department of Police may prefer in certain instances to provide for the right to counsel at pre-indictment lineups involving police personnel, where the investigation has focused on that individual or individuals, in order to avoid any possible deprivation of lineup evidence in future actions seeking removal or discharge that may be brought against such personnel.

It is the opinion of this Office that the forms you have attached to your inquiry would be suitable for the purposes of advising of the right to counsel, waiver and continuance pursuant to the requirements of amended Section 10-1-18.1 of the Illinois Municipal Code.

Finally, it is our opinion that the sample form captioned "Constitutional Rights Warning: Line-up" is a satisfactory one with the reminder that Item (4) regarding appointment of counsel is necessary only if the subject is indigent and a serious criminal matter is involved.

ARREST OF STATE PRISONER RELEASED UNDER THE WORK-RELEASE PROGRAM

(Acting Director, Research & Development Chicago Police Dept.—H. N. L.—June 16, 1971)

This letter is in response to your request of June 1, 1971, for an opinion regarding the following questions:

(1) When a state prisoner, who has been released under the work-release program pursuant to the Illinois Criminal Code § 127-7 (Ill. Rev. Stat. ch. 38, § 123-7) is arrested by the Chicago Police Department, should he be held until the local work-release center can be notified and send someone to take custody of him, rather than admit him to bail; and

(2) Would the turn-over of the subject to the work-release center take precedence over a Chicago Police Department arrest.

In answer to your first question, a person arrested who is also an inmate on the work-release program cannot be denied bail on the charge for which he has been arrested because of the fact that he is on the work-release program. The work-release prisoner is similar to the parolee in terms of right to bail since both are technically in custody serving their sentence outside of confinement. Therefore, cases on paroled prisoners would be applicable to the work-release situation. In the case of the parolee, the arrested person would be entitled to bail on the new charge for which he was arrested. *People ex rel. Johnson* v. *Pate,* 47 Ill. 2d 172 (1970). In the case of a work-release prisoner we could not hold the arrested person without bail so that the local work-release center can have him picked up. He would be entitled to bail just as the parolee.

When a person is arrested, our duty is to take him "without unnecessary delay" before a judge for a preliminary hearing and to set bail. Code of Criminal Procedure § 109-1 (Ill. Rev. Stat. ch. 38, § 109-1).

Various cases have interpreted what constitutes unreasonable delay. In *People* v. *Jackson,* 23 Ill. 2d 174 (1961) the Illinois Supreme Court stated that:

> ". . . whether there was or was not unreasonable delay must be determined from all the facts and circumstances of the particular case." (at 278).

In that case two days were not unreasonable. (In the recent case of *United States ex rel. Lloyd* v. *Pate,* 406 F. 2d 617 (1969) one day was held not unreasonable.)

Although the prisoner, whether a parolee or an inmate on work-release, could not be denied bail on the pending charge, his parole or work-release could be revoked. If that takes place we could legally turn the prisoner over to the proper prison authorities. Therefore, as soon as a work-release inmate is arrested, the local work-release center can be notified, but, the inmate cannot be held without bail until someone from the work-release center can arrive to take custody of him. We can only hold the inmate for the time limits of "unnecessary delay." If the local work-release facility decides not to, or fails to send someone to take custody of the prisoner within the time limits of "unreasonable delay," we would have to release him on bail pursuant to the statute.

In considering your second question, whether our jurisdiction over a prisoner is lost if he has been released to a prison authority, under the decisions it is clear that this would not deprive us of jurisdiction. In *People ex rel. Scott* v. *Jones,* 44 Ill. 2d 343 (1970), the Supreme Court stated that such action would not deprive the arresting authority of jurisdiction. The court held that when a paroled prisoner was on bail and his parole was revoked, the prison officials ". . . would have been required to have surrendered him for the completion of prosecution by the Cook County authorities . . ." (44 Ill. 2d 343 at 347); *United States* ex rel. *Brewer* v. *Maroney* (3rd cir. 1963) 315 F. 2d 687.

Therefore, releasing a prisoner to the State Department of Correction would not affect our prior jurisdiction to prosecute him on the charge for which he was arrested.

PROCUREMENT OF INSURANCE BY DONEE OF RETIRED POLICE DOG

(Deputy Superintendent of Police—A. H.—February 13, 1969)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel with respect to whether the recipient of a retired police dog should be required to secure insurance in addition to signing an indemnification agreement already drafted for use in such cases by the Law Department, has been referred to the undersigned for consideration and response.

Although it is possible to make the procurement by a donee of insurance a necessary element in every gift of a retired police dog, we see this as a policy question to be determined by the Police Department. Nevertheless, we shall make several observations which may assist the department in arriving at said policy.

As a practical matter, the procurement of insurance by a donee would be desirable from the standpoint of the donee and his family should some untoward incident occur and each donee should, perhaps, be so advised. To make the purchase of insurance a condition of the gift, however, could raise practical difficulties with regard to enforcement, *e.g.,* cancellation of the policy, lapse of the policy, etc. These are matters which the Police Department must consider from the standpoint of efficacious administration.

With respect to the question as to the amount of insurance to be required assuming that you make the procurement of insurance a condition of the gift, this again is a question of policy, rather than of law. We would observe that although it is difficult to foresee the amount of damage that can be visited upon persons or property by a retired police dog whose behavior has gone awry, the imposition of more than an ordinary homeowner's public liability limit in such cases would seem to suggest that such dogs should not be the subject of gifts at all, but rather "retired" in other ways as potential threats to the public health and safety.

DISPOSITION OF "RETIRED" POLICE DOGS

(Superintendent of Police—A. H.—March 11, 1968)

The Chicago Police Department communications addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, regarding disposal by the Police Department of "retired" police dogs which have previously served with the Canine Unit, have been referred to the undersigned for consideration and response.

The suggestion that said dogs be given to their former handlers has been carefully analyzed and considered and we conclude that the Police Department could avoid the legal problems presented by maintaining control of said dogs unless and until they are sold to another governmental agency which can assume full responsibility and liability for the maintenance and activities of said dogs, or until they are deceased. In the event, however, the Police Department nevertheless intends to make a gift of said dogs as aforesaid, the following problems appear to arise.

At the outset, we are confronted with the apparent policy of the City of Chicago to restrain, if not discourage, the ownership and maintenance of "dangerous, fierce or vicious" dogs within the City. See, *e.g.,* Municipal Code of Chicago, Chapter 98, Sections 98-37, 98-38 and 98-42. A dog which has been trained to disable, maim, or perhaps kill, appears to fall within the above description.

Further, under the common law, the owner of an animal having a disposition or propensity different from other animals of the same species carries a heavier burden with respect to possible liability, by reason of injuries caused by said animal than owners of other animals aforesaid. See, *e.g., Domm* v. *Hollenbeck,* 259 Ill. 382, 385. In the case of the "retired" police dogs, the difference in disposition or propensity to which we have alluded may be found in its training and experience.

Should it be decieded to give such dogs to their handlers, we have enclosed a proposed form of agreement to be signed by the handler and his wife (and any adult children) on behalf of their family. The agreement sets forth an understanding in the nature of a covenant not to sue and an indemnification and hold harmless agreement. The document is intended to secure the promises of the donee family not to sue the City of Chicago, its officers, agents, employees and servants, by reason of the gift by the Police Department and the ownership by the family of said dog, as well as the promises to indemnify the City of Chicago, its officers, agents, employees and servants, and otherwise hold them harmless from all claims as may arise by reason of said gift or ownership.

The suggestion by the Police Department that a "release" be prepared to relieve the City from future liability for the dog's action has been carefully considered; however, in our opinion, any outright discharge which purports to cover claims not in existence at the time of the agreement may be construed as a consent to forego all future legal protection contrary to public policy (see, *e.g.,* discussion in *Jackson* v. *First National Bank,* 415 Ill. 453, 460), or may be narrowly construed as beyond the contemplation of the parties at the time they enter the agreement (see, *e.g., Rensink* v. *Wallenfang,* 8 Wis. 2d 206, 99 N.W. 2d 196).

The training, dispositions and propensities of dogs which have served with the Canine Section are, of course, best known to the Police Department, and the wisdom of giving such dogs even to former handlers, and members of their families who would presumably have control of said dogs from time to time, of course, falls within the realm of policy for the Police Department to determine in the final analysis.

NEW ARM PATCH FOR CHICAGO POLICE

(Superintendent of Police—R. L. C.—October 21, 1970)

You recently supplied me with a memorandum from your department liaison officer regarding the adoption of a new arm patch as part of the official uniform of the Chicago Police Department. The facsimile of the patch which you submitted shows the flag of Chicago, together with the words "I Will". You have asked that we review this proposal as to the steps necessary to adopt the same.

Chapter 11-5 of the Municipal Code gives the Superintendent "complete authority to administer the department in a manner consistent with the ordinance of the City, the laws of the State and the rules and regulations of the Police Board". There is no Code provision prescribing the kind of uniform and type of ornamentation appropriate therefor. The Municipal Code addresses itself merely to the question of an appropriate badge (Section 11-36). This being the case, it is clear that the Superintendent of Police has authority to promulgate rules, regulations and directives as to the appropriate attire worn by members of the uniform force without action by either the Chicago City Council or the Chicago Police Board.

You inquire further as to whether or not the Municipal Code contains sufficient safeguards against the duplication or adoption of this patch by other watch services, special policemen, etc. In this regard, Section 11-47 of the Municipal Code which reads in part: "No person shall counterfeit or imitate or cause to be counterfeited or imitated any badge, sign, signal or device adopted by the Department of Police nor shall any person use or wear any badge, sign, signal or device adopted or used by said department or any similar in appearance without authority to do so from the Board", adequately provides the safeguards you desire.

CITY POLICEMEN REQUIRED TO BE RESIDENTS OF CHICAGO

(City Council—D. P., M. E. A.—October 28, 1970)

On October 27, 1970, the Illinois Appellate Court rendered a decision affirming the judgment of the Circuit Court of Cook County which had upheld the validity of a rule of the Police Board of the City of Chicago requiring Chicago patrolmen to be residents of the City.

The plaintiffs urged upon the court the view that the residence requirements could only be made by the Civil Service Commission and, there being no such rule by the Commission, the restriction could not be enforced by the Police Board. In rejecting this argument and in affirming the judgment of the Circuit Court, the Appellate Court held that:

> "The requirement of residency is more properly left to the decision of that agency responsible for the mechanics of operating the Police Department . . . . . [T]he requirement has a far more direct and rational relationship to the 'governance' of the Police Department and the decision should properly be left to the Police Board."

PROPOSED DISCIPLINARY PROCEDURES AMENDMENT

(Superintendent of Police—A. H.—March 3, 1970)

Your recent request for an opinion with respect to proposed Amendment 67-21E to General Order 67-21, Complaint, Disciplinary, and Summary Punishment Procedures, has been referred to the undersigned for consideration and response.

The new amendment appears generally to be in acceptable legal form, except for several items which, in our opinion, should be changed. The proposed amendment does not now provide for making available to an accused police officer the ". . . complete record of any hearing, interrogation or examination [as] shall be made and a complete transcript thereof made available to such officer or employee without charge and without delay," which is now made a part of Section 10-1-18.1 (Ill. Rev. Stat. 1969, ch. 24, par. 10-1-18.1; House Bill 2637). Since proposed Amendment 67-21E contains other newly instituted protections for accused police officers, it appears advisable to include this provision as well.

Further, after conference with Mr. Charles Finston, Aide to the Superintendent, and Capt. Harry Ervanian, Director of the Internal Investigation Division, it was decided to modify the "Statutory Rights" form so as to contemplate both those actions which may result in criminal charges and those which would be purely civil, copies of each of which are herewith enclosed. Also modified were the "Waiver of Counsel" and "Rejection of Waiver" forms, copies of which are also enclosed.

DISCLOSURE OF ECONOMIC INTERESTS

(Superintendent of Police—R. F. F.—April 7, 1972)

This is in answer to your inquiry whether certain police officers are required to file a declaration of economic interest by the amendments to the Illinois Governmental Ethics Act (Ill. Rev. Stat. 1971, §§ 601-101, et seq.).

1. Is a police officer required to file a declaration if he works in his spare time as a school guard for the Chicago Board of Education and, although neither salary he receives exceeds $20,000, the sum of his earnings from the two governmental bodies is greater than $20,000?

Section 4A-101(i) of the Act requires disclosure from:

> "Persons who are employed by a school district or by any unit of local government as defined by the Illinois Constitution, and are compensated for services to such unit of local government as employees and not as independent contractors at the rate of $20,000 per year or more."

Thus, if the police officer receives $20,000 from any single local government entity, he would be required to file. However, throughout subsection (i), governmental units are referred to in the singular. The Act, therefore, requires disclosure only if a governmental unit, separately, pays the employee more than $20,000.

Moreover, the Governmental Ethics Act requires income disclosure of those public officials who are in administrative, supervisory, decision making or policy making positions. It is presumed that persons in those positions receive more than $20,000. The $20,000 minimum is designed to exclude public employees not acting in those capacities.

Neither of the positions held by the police officer, taken individually, is one of such supervisory or decision making responsibility. Although the officer's total income is greater than $20,000, he receives it for performing two separate non-supervisory jobs. In such a case, the officer is not required to file a disclosure of economic interest.

2. Is disclosure required if both a husband and his wife are members of the Police Department and neither, individually, receives more than $20,000, but the sum of their incomes exceed $20,000?

As with the first example, since neither husband nor wife receives more than $20,000, it is presumed that neither occupies a supervisory, administrative or decision making or policy making position. Thus, it is not the intent of the statute to require disclosure if neither exceeds the statutory minimum.

Moreover, the Governmental Ethics Act only requires disclosure if an individual's salary exceeds $20,000. A spouse's income is only taken into account if the interest of one spouse is constructively controlled by the other. See Section 4A-102. That is not the case in this example, and neither is required to disclose.

"MOONLIGHTING" BY FIREMEN & POLICEMEN

(Senior Assistant Corporation Counsel, Rochester, N.Y.—H. L. R.—April 17, 1968)

Your letter to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for response. In your letter, you ask for information about "moonlighting" by firemen and policemen in Chicago.

Section 404 of the Rules and Regulations, Practice and Procedures of the Chicago Fire Department prohibits all outside employment. Firemen may not be actively engaged in any private business, trade, profession or occupation.

The Chicago Police Department prohibits certain types of outside employment, but permits all others which do not interfere with the performance of police duties. For example, until recently, Rule 17 of the Rules and Regulations of the Chicago Police Department prohibited engaging directly or indirectly in the ownership, maintenance or operation of a taxicab, tavern, or retail liquor establishment. The rule has now been amended to permit policemen to drive taxicabs. Before beginning any outside employment, a police officer must first obtain Department permission. Enclosed is a copy of the Department's order on secondary employment.

POLICE DEPARTMENT RULE 31—MULLER v. CONLISK

(Superintendent of Police—R. L. C.—June 9, 1971)

Since the ruling of the United States Court of Appeals in *Muller* v. *Conlisk* held Rule 31 of the Rules and Regulations of the Chicago Police Department to be unconstitutional and invalid, this office has undertaken a review of that decision with the purpose in mind of suggesting amendatory language which would address itself to both the needs of the Department and the direction of the court.

The following is a draft of our suggested revision of Rule 31 for your review, comment and adoption:

> "Rule 31. Engaging in any public statements, interviews, activity, deliberation or discussion pertaining to the police department which reasonably can be foreseen to impair the discipline, efficiency, public service, or public confidence in the Department or its personnel.
> by:
>
> (a) false statements, or reckless unsupported accusations.
>
> (b) the use of defamatory language, abusive language, invective or epithets."

NON-DUTY DISABILITY BENEFITS AND PREGNANCY

(Superintendent of Police, President Civil Service Commission—R. F. F. —March 7, 1973)

The Chicago Civil Service Commission has forwarded a letter from Angela Schreiner, a Chicago policewoman, dated June 20, 1972, asking whether non-duty disability benefits are payable to policewomen for disability due to pregnancy.

It is our opinion that if benefits are payable for non-duty disabilities other than pregnancy, then benefits must also be paid for pregnancy. Denying an employee these benefits because of pregnancy is discrimination on the basis of sex, a practice that has been made unlawful by the Federal Equal Employment Opportunity Act, as amended in 1972.

The Equal Employment Opportunity Act, 42 U.S.C. §2000e-2(a) (1) makes it unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of the employee's race, color, religion, sex or national origin. "Employer," as used in the statute, includes state and local governmental units and their agencies. 42 U.S.C. §2000e-(b). (This includes civil service commissions as well. 42 U.S.C. §2000e-(f).) The courts have interpreted this act as prohibiting unequal treatment of women because of their sex when such treatment is not based on a consideration of their individual capacity and ability to carry out their job. *Schattman* v. *Texas Employment Commission,* 459 F.2d 32 (5th Cir. Tex. (1972); *Sprogis* v. *United Airlines, Inc.,* 444 F.2d 1194 (7th Cir., 1971).

Construing these provisions of the Act, the Equal Employment Opportunity Commission in March, 1971, issued decision number 71-1474 holding that it was an unlawful discrimination on account of sex to maintain non-occupational disability insurance under which benefits were denied female employees disabled because of pregnancy. This decision, together with *Schattman* and *Sprogis,* would require the police department to change any existing policy regarding disability benefits so as to treat pregnancy in a manner similar to other types of disability.

In addition, the United States District Court for the Northern District of Illinois recently held that a school board's mandatory sick leave for pregnancy and its refusal to grant benefits during such leave violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Bravo* v. *Board of Education of the City of Chicago,* 345 F. Supp. 155 (N.D. Ill., 1972). In that case it had been Board policy to require teachers, after the fourth month of pregnancy, to take a leave of absence without pay and without the right to be reinstated in their old jobs. Sick leave for other types of disability were granted by the Board of Education with pay and without loss of position upon return. The *Bravo* court found that the different treatment due to pregnancy was arbitrary and that it was unconstitutional because it bore no rational and substantial relationship to any valid purpose of the Board.

It should be noted that a court in another circuit has come to a conclusion opposite to that of the court in *Bravo.* In *Struck* v. *Sec'y of Defense,* 460 F.2d 1372 (9th Cir. 1972), the Court of Appeals for the Ninth Circuit held that the government had demonstrated a compelling interest in the discharge (not merely mandatory leave) of a pregnant Air Force officer.

Chicago must follow the *Bravo* holding, however, first because the *Struck* decision is not final, being on review before the United States Supreme Court (No. 72-186, cert. granted October 24, 1972) and because Chicago is within the jurisdiction of the Seventh Circuit.

The Police Department's present policy in regard to non-duty disability benefits is not in accord with these statutes and decisions. Under the Department's present general order 67-3 and its proposed amendments, female civil service employees are required to take a leave of absence of at least nine months, but no longer than twelve months, at the end of the fifth month of pregnancy. While

on maternity leave, a female employee does not receive any of her regular salary or other disability benefits from the department. On the other hand, all police department employees may obtain sick leave for any other type of physical disability which renders them unable to work. The duration of the ordinary sick leave is not pre-determined by the nature of the disability as is the case with pregnancy. An employee on sick leave receives his salary for at least part of his absence. The length of time an employee can receive his salary depends on Whether he is a civilian employee or sworn member of the force. Civilian employees are given up to 120 days paid sick leave. Sworn members, as a matter of course, receive sick leave with pay for up to six months (although this benefit is actually a discretionary matter for the police board under section 11-44 of the Municipal Code of Chicago.) None of these sick leave benefits, however, are presently provided for pregnancy.

Because of the aforementioned recent changes in Federal law, the police department should review its policy so as to provide disability benefits for pregnancy on the same basis which benefits are provided for other types of non-duty disability. However, nothing we have said will prevent the police surgeon from putting a policewoman on sick leave when in his sound medical judgment her duties endanger her health or that of her unborn child, or her condition prevents her from carrying out department assignments. See *Schattman* v. *Texas Employment Comm'n,* 459 F.2d 32 (5th Cir. 1972).

REFUSAL BY POLICE OFFICERS TO SUBMIT TO POLYGRAPH EXAMINATION

(City Council—M. E. A.—November 30, 1967)

On November 30, 1967 the Illinois Appellate Court rendered an opinion affirming a judgment of the Circuit Court of Cook County which had affirmed the decision of the Board of Fire and Police Commissioners of the Village of Skokie ordering the plaintiff's discharge from the Skokie Police Department.

The charges against the plaintiff included refusing to obey an order of the Chief of Police to take a polygraph examination. The Board discharged the plaintiff. On administrative review, the Circuit Court of Cook County upheld the discharge.

Orlando W. Wilson, then Superintendent of Police of the City of Chicago, intervened in the Illinois Appellate Court proceeding as Amicus Curiae. The Illinois Appellate Court, in affirming the judgment of the Circuit Court, adopted the contentions of Superintendent Wilson stating (Opinion pp. 12-13):

> "The Chief of police did not exceed his authority in ordering Coursey to take the examination and his authority was not arbitrarily exercised. As a private individual Coursey did not have to submit to the examination, but as a policeman he did not have the privilege of refusing; having refused, he forfeited any right he had to be retained on the police force because his refusal was in conflict with his obligation as a policeman to obey the order of his commanding officer. His refusal impeded the investigation of a serious charge affecting the whole police department as well as himself. To sustain his action would be to vitiate the systematic authority and discipline upon which proper enforcement of the law is dependent.
>
> "The evidence was suffcient to sustain all the factual findings made by the board. And it therefore became the board's responsibility to evaluate the gravity of the proved violations and to determine what disciplinary sanction should be imposed for the infractions of the police department regulations and the non-compliance with the instruction of the department's commanding officer. The decision to remove Coursey from the force was not capricious; it was reasonably related to his misconduct, to the discipline and efficiency of the department and to the maintenance of public confidence in the department."

This is an important opinion in that it upholds the right of the Superintendent of Police to discharge a police officer who refuses to obey an order to cooperate in an investigation by submitting to a polygraph examination.

JUDICIAL REVIEW OF POLICE BOARD FINDINGS

(City Council—R. S. C., M. E. A.—July 18, 1967)

On July 14, 1967, the Illinois Appellate Court rendered an opinion affirming a judgment of the Circuit Court of Cook County which had affirmed the decision of the Police Board of the City of Chicago ordering the plaintiff's discharge from the City's Police Department.

The plaintiff was charged and found guilty of "Conduct Unbecoming a Police Officer" and "Immoral Conduct". The Police Board found that the plaintiff permitted juveniles to come to his apartment when they were required to be in school; that he served alcohol to juveniles, and had sexual intercourse with a minor not his wife.

The Illinois Appellate Court, in affirming the judgment of the Circuit Court, states in regard to findings made by an administrative agency (Opinion p. 3): "The findings and conclusions of the Police Board are deemed prima facie true and correct . . . We may review these findings of fact to determine if they are supported by the evidence, but they can be set aside only if against the manifest weight of the evidence."

REVIEW OF POLICE BOARD DECISIONS

(City Council—R. L., M. E. A.—June 11, 1968)

On June 5, 1968, the Illinois Appellate Court affirmed a judgment of the Circuit Court of Cook County dismissing the plaintiff's complaint which had sought injunctive and declaratory relief to prevent the Superintendent of Police from ordering plaintiff dismissed from the police force pursuant to a decision of the Police Board.

On September 11, 1962, the Police Board ordered plaintiff discharged from the the police force. On that date plaintiff was on disability statuts having been injured in the line of duty. On February 9, 1966, has was found medically fit for active duty and was discharged from the police force in accordance with the Police Board decision. Plaintiff brought this action in equity to prevent the discharge. The Circuit Court of Cook County dismissed the complaint finding that the Court did not have jurisdiction of the cause as the relief sought was governed by the Administrative Review Act.

The Illinois Appellate Court affirmed the judgment of the Circuit Court of Cook County finding that the Administrative Review Act precludes equitable review of Police Board decisions. The Appellate Court refused to find equitable grounds for dispensing with the requirements of the Administrative Review Act. The Illinois Appellate Court also stated that, "We cannot find that the Superintendent's reinstatement of the officer for the purpose of enabling that officer to receive disability benefits precluded the Superintendent from enforcing the Board's decision after the medical disability ended nor that it created a new relationship [between the Police Department and plaintiff]. Furthermore, even if the Superintendent were under a statutory mandate to act immediately it would not follow that his ultimate compliance with the Board's decision was ineffective under the circumstances of this case."

POLICE CIVILIAN REVIEW BOARDS

(Legislative Service Bureau, Lansing, Michigan—R. D. W.—July 10, 1969)

Your inquiry relating to "police civilian review boards" has been referred to this office for reply. In common usage, the term "civilian review board" may connote an independent board consisting of qualified civilian representatives of the community who convene upon civilian complaints of police misconduct. The term "civilian review board" also connotes a police review board consisting of appointed persons who are not members of the police department itself, and who regularly convene for the purpose of adopting rules and regulations for the police department, reviewing the annual departmental budget, and serving as a disciplinary body for police and civilian employees of the department.

The City of Chicago does not have the former type of "civilian review board"; however, it does have the latter type of review board. Chapter 24, paragraph 3-7-3.1 of the Illinois Revised Statutes (1967) authorizes a Police Board and also prescribes the powers and duties of that Board. Furthermore, Chapter 24, paragraph 10-1-18.1 of the Illinois Revised Statutes (1967) provides for police removals or suspensions in hearings conducted by the Board.

RECOMMENDATIONS FOR CHANGE IN POLICE DEPARTMENT PERSONNEL PRACTICES

(Office of Civil Rights Compliance—R. L. C.—January 5, 1973)

The August 1972 report of "The Chicago Police Department: An Evaluation of Personnel Practices" which was prepared by a Survey Team for the Law Enforcement Assistance Administration contained thirty-six (36) specific recommendations or suggestions for change in the Department's personnel practices. Each of these thirty-six items was discussed in detail at a four-hour meeting between representatives of LEAA and the City of Chicago on October 27, 1972. The result of this fruitful exchange was to reduce that original number of 36 to 10 specific items (numbered in the Report as 4, 5, 10, 19, 20, 21, 22, 23, 35 and 36) requiring further dialogue or a formal expression of position.

Your letter of November 7, 1972 summarizes and reiterates the LEAA position which you verbalized at our October 27, 1972 meeting. I will herein attempt to present the City's position regarding these remaining 10 items in the topical fashion (Initial Selection, Promotional Policy, Discipline) which your letter has adopted.

Before doing so, however, certain *basic* premises should be stated as underlying the City's position, so that whatever differences may continue to exist will clearly be understood to be differences in method or interpretation and not in goals.

1) *Equal* opportunity for all applicants to original entry examinations and for all candidates for promotional consideration has been and will continue to be a primary goal of the Chicago Civil Service Commission.

2) A "validated" examination and testing procedure is a goal still largely unachieved in both the private and the public employment sector—*none* are currently known to exist for testing police candidates. In attempting to meet that goal it will be the policy of the Chicago Civil Service Commission to use as the basis for employment decisions such tests and other appraisal procedures as are reasonably related to job requirements,

so that employment by merit principles and the concept of equal employment opportunity are served and affirmed.

3) There is no single method of "validation" to the exclusion of others, nor can one method be considered superior to another as an abstract strategy, but only in relation to actual situations. This being the case, it is the responsibility of the Chicago Civil Service Commission to determine the appropriate and valid selection instruments. This responsibility runs to all classified positions in the City service and not just to the Police Department.

4) Integrity of examinations and confidence in results is a matter of great local concern. If fears and suspicion do exist and if they are to be allayed, then monitors and/or observers should be drawn from the ranks of those whose confidence level in the community is not speculative.

5) Case law on the subject of discriminatory employment testing procedures is recent in time and limited in scope. Absent specific judicial support, LEAA's interpretation of the law is no more or less valid than that of any other informed lawyer and certainly not determination of the issue.

Having set forth those basic premises which the City deems necessary to a proper evaluation of any recommendation, I will consider the group recommendations individually.

Initial Selection—Your letter of November 7, 1972 states "The eligibility list should be suspended . . . no later than June 30, 1973." This deadline is unwarranted and unrealistic due to the facts that 1) the Illinois Statutes (Ch. 24, par. 10-1-14, Ill. Rev. Stat. 1971) direct that an eligibility list be maintained for at least two years, and 2) neither the Survey Team Report nor your letter contains any statistical review of the present list nor any allegation of a disproportionate racial impact resulting from its utilization.

Representatives of the Civil Service Commission indicated to you at our meeting their intention to develop new testing procedures to assure the validity and job relatedness of all future examinations. The Commission will be undertaking additional validity studies for the patrolmen's examination now that appointments have been made from the eligibility list. It is Commission policy to demonstrate validity of examinations in accordance with guidelines on employee selection procedures of the Equal Employment Opportunity Commission. The Civil Service Commission will be working closely with the Police Training Academy to determine validity of the recent patrolmen's examination during 1973.

Your letter confirms that "a clear need is present in the police community to develop test-instruments which conform to the constitutional standards, and meet the requirement of job-relatedness mandated by *Griggs* v. *Duke Power.*" Your awareness of the need seems inconsistent with your stated decision *not to grant financial assistance to any studies* except those seeking to validate the test battery developed by the Industrial Relations Center. Nonetheless, it is precisely towards this goal (developing valid, job related test instruments) that the Civil Service Commission will direct its capable staff during the months preceding the next patrolmen's examination.

With respect to the medical examination, the Commission will conditionally accept candidates who are within 10% of the required weight provided the candidates can meet the standard at the appropriate time. Furthermore, the Commission will be reviewing the appropriateness and job relatedness of its medical procedures between now and the next patrolmen's examination.

Promotional Policy—As stated above, it is the policy of the Civil Service Commission to develop and administer examinations in accordance with the EEOC guidelines. Promotional examinations will be proposed which are both valid and job related.

Integrity of promotional examinations will be maintained and steps will be taken in those instances where suspicion and doubt are found to threaten the

acceptance of examination results. In addition to using, in select cases, community related monitors or observers, you were informed that the Commission plans to procure and utilize equipment which permits almost instant scoring of test results.

The "one year probationary status" for newly promoted officers requires action by the Illinois General Assembly, both houses of which will be almost equally divided, politically, in the 1973 Session. No assurances of success in achieving legislative changes can reasonably be given. Those who suggest that Constitutional Home Rule provides a short-cut to achieve these changes are simply not aware of the complexity of the problem.

Both Recommendation #23 and your letter speak in terms of establishing *goals* for promotion of minority officers; however, this concept is extremely vague. As presented in #23, it seems clearly to be in variance with the principles of merit employment and suggestive of an approach to personnel practices which is not aimed at *equal* opportunity. Inasmuch as predetermined "goals," "quotas" and the like are at war with both of the concepts (merit employment and equal opportunity) sought to be strengthened by the *Griggs* decision and its progency; I believe the Civil Service policy set out in #2 above is a more appropriate standard.

In your letter of November 7, 1972 you asserted that no eligibility list based on the captain's examination should be developed. However, I understand that you have been informed that the eligibility list from the recent Police Captain's examination was posted on November 29, 1972.

Discipline—No actual disciplinary files were examined or reviewed by either the Survey Team or LEAA's team of computer experts to determine the fairness and thoroughness of the IAD investigation. Despite that fact, your letter paraphrases the report by stating that "the *evidence* gathered by the Survey Team *raises inferences* of racially disparate treatment." Such statistical analysis of results, without more, is not a reliable barometer with which to measure "fairness."

As a contrast to this "evidence," consider the findings of the International Association of Chiefs of Police, in "A Survey of the Chicago Police Department," on the subject of discipline:

> ". . . Inspection of the complaint register files did not disclose any pattern or specific level of command at which the Complaint Review Panel either concurs or disagrees, with the exception of recommendations submitted by the IAD through their independent investigations in which 47.1 per cent were unanimously lowered by decisions of the CPP. . . ."
>
> ". . . We conclude that the CPP hearings conducted under the supervision of the department advocate are *thorough and fair,* and *believe every effort is made to determine* a just recommendation."

Appropriate and even-handed administration of both "formal" and "informal" discipline is a subject which receives continuous review and modification within the Police Department; is constantly scrutinized by the courts; has been audited by numerous consultants and is considered "open" at all times for suggested improvement. For this latter reason, Superintendent Conlisk has agreed to attempt the development of additional procedures to assure fairness and even-handedness in the disciplinary processes at all levels. It should be clearly understood, however, that this will not incorporate civilian hearing officers as suggested by the Survey Team.

I hope this response to your letter of November 7, 1972 will serve to assist you in understanding the City's position on these remaining ten items.

ISSUANCE OF PRESS CARDS

(Superintendent of Police—M. E. A.—February 14, 1969)

Reference is made to your letter of February 7, 1969 in which you request our opinion as to whether you may refuse to issue press cards for the following publications: *The Seed, West Side Torch, The Guardian* and *The Chicago Maroon.*

Section 193-7.3 of the Municipal Code of Chicago provides:

> "The application for such press cards shall be made in writing by the employer on behalf of the employee qualified to hold press cards. The employer shall represent that the employee on whose behalf an application for a press card is made is a full-time reporter, editor, writer, photographer or broadcaster of spot news, is of good moral character and is a citizen of the United States. No such card shall be issued unless the applicant meets these requirements and unless and until the fingerprints of the prospective holder are filed in the office of the commissioner of police."

It is our opinion that applicants for press cards can be refused pursuant to the above-quoted provision for the following reasons:

(1) *The West Side Torch* applicants, according to your letter, have criminal records. Therefore, the applicants are not "of a good moral character".

(2) According to your letter, *The Guardian's* representative is a self-proclaimed revolutionary. For that reason, his "moral character" is questionable.

(3) Charges of publishing obscenity are pending against *The Seed.* Therefore, for reasons of "moral character", the applicant's application may be denied.

(4) *The Chicago Maroon* is a college newspaper and its personnel are not "full-time". Therefore, application may be denied.

It is our opinion that there are legal grounds to refuse the aforementioned applications. However, whether from a policy viewpoint this should be done is a matter solely within your discretion and that of the "Advisory Committee" created pursuant to Section 193-7.4 of the Municipal Code of Chicago.

EMPLOYMENT OF CIVILIAN PERSONNEL AS "TRAFFIC INTERSECTION CONTROLLERS"

(Acting Director of Planning, Department of Police—H. L. R.—April 10, 1968)

A recent letter from the Department of Police, City of Chicago, addressed to Raymond F. Simon, Corporation Counsel, seeking an opinion with respect to the legality of employing civilian personnel as "Traffic Intersection Controllers," has been referred to the undersigned for consideration and response.

The letter states that the specific area of utilization of such persons would be in directing, regulating and controlling vehicular and pedestrian traffic on the public way, particularly at those intersections along the major arteries of the central business district. The letter postulates certain legal questions which are anticipated to arise in the event the proposed civilian employees should be authorized to function as aforesaid.

The Illinois Municipal Code provides in Section 11-1-1 that each municipality may pass and enforce all necessary police ordinances and, in Section 11-1-2, authorizes municipalities to prescribe the duties and powers of all police officers

(Ill. Rev. Stat. 1967, chap. 24, pars. 11-1-1, 11-1-2). In Section 5-3-10 of the Municipal Code, municipalities are given the power to pass a general ordinance within which they may make such rules and regulations as are necessary or proper for the efficient and economical conduct of the business of the City (Ill. Rev. Stat. 1967, ch. 24, par. 5-3-10). The foregoing provisions become particularly important when the well established rule is considered imposing upon municipalities the burden of maintaining peace and order within their boundaries. See, *e.g., Littell* v. *City of Peoria,* 374 Ill. 344, 347.

The above and foregoing statutory and case authorities were cited and relied upon by the Illinois Supreme Court in the recent cases of *Hunt* v. *City of Peoria,* 30 Ill. 2d 230 and *Berry* v. *City of Peoria,* 32 Ill. 2d 386. In those cases, the Supreme Court held that a municipality may interchange duties to be fulfilled by police and firemen, whereby policemen may be assigned duties as firemen and firemen may be assigned duties as policemen. It thus appears, in having so construed the statutes and in having so held, that the Supreme Court interprets the powers delegated to municipalities as sufficiently broad so as to permit the employment of non-police personnel in certain police activities.

The proposal advanced by the Department of Police, by analogy to the foregoing statutory provisions and case authorities, whereby civilian personnel would be assigned limited functions in regulating the flow of traffic at various intersections throughout the City, not rising to the power of arrest, however, appears permissible under the law. No reason suggests itself as to why, if an employee of the Fire Department of a municipality may be employed to fulfill certain police functions, an employee of the Department of Streets and Sanitation or some other such City department might not also be so assigned. Nor does any reason appear as to why, then, civilian personnel may not be employed by the Department of Police itself, in the first instance, to fulfill certain of those functions.

It should be made abundantly clear, however, that we are speaking of civilian personnel whose functions would be limited to the directing and regulating vehicular and pedestrian traffic on the public ways, and which would not extend to the power of arrest, a power which should not be exercised by persons other than those occupying the positions of police officers.

You have asked certain questions respecting the proposed employment aforesaid, some of which have already been answered in the body of the foregoing opinion; however, in the interest of clarity, we shall specifically answer these questions. You ask whether Sections 27-373, 27-384 and 27-393 (a) and (b) of the Municipal Code of Chicago require revision in view of the proposed employment of traffic controllers.

Section 27-373 relates to the movement of vehicles by persons other than police officers into certain prohibited areas. This section will not require amendment, as traffic controllers would not have the right to enter and assume control over private property, as contemplated by this ordinance. Only police officers have the authority to enter and move vehicles; if one must be moved to expedite the flow of traffic, a traffic controller may request police assistance in its removal.

Section 27-384 will not require amendment. This section calls for *enforcement* of traffic regulations by members of the police department. Traffic controllers will not have the power to enforce traffic laws, but only to regulate the movement of traffic, as we understand your proposal.

Section 27-393 (a) will not require amendment. This section calls for the *enforcement* of all street traffic ordinances, whereas traffic controllers will only be given the power to direct and regulate the movement of traffic. Section 27-393 (b) will require amendment to include the term traffic intersection controllers before the term "crossing guards." This section will give these controllers the power to direct traffic after being assigned to such duties by the Superintendent of Police. We have prepared such an amendment, a copy of which is herewith enclosed.

Section 11-1, chapter 11, of the Municipal Code of Chicago also requires amendment by the addition of a fourth paragraph, which will state in substance:

"To supplement the police department, the superintendent may appoint such a number of civilian traffic intersection controllers to direct and regulate traffic at any insections as may be required for that purpose."

We have prepared an amendment embodying the foregoing language, as well as other changes we deem necessary, a copy of which is also herewith enclosed.

The authority to issue traffic citations for moving violations should not be vested in traffic intersection controllers, as suggested by your letter. They will only have the authority to regulate and direct moving traffic and not to enforce laws and ordinances, as previously noted, which would rise to the power of arrest.

AUXILIARY POLICE OFFICERS

(Superintendent of Police—S. S., M. E. A.—February 11, 1969)

Reference is made to our letter to you dated October 16, 1968, in which we concluded that auxiliary police officers would not be covered under the indemnity section of the Illinois Municipal Code (Ill. Rev. Stat. 1967, ch. 24, par. 1-4-5). Pursuant to the request in your letter of October 29, 1968, Mr. Sikevitz of our office has met with Lieutenants O'Donnell and Dobrich of your Planning Division "for further clarification". Although the conclusion of our October 16, 1968 letter remains unchanged, the following supplemental opinion is submitted "for further clarification".

In view of the fact that auxiliary police officers would not be members of the police department for purposes of indemnification, it is our opinion that they might therefore be covered as employees under the Workmen's Compensation Act (Ill. Rev. Stat. 1967, ch. 48, par. 138.1 (b)1). It is suggested, however, that your office contact the Industrial Commission for their views on this matter. If the Industrial Commission concurs that auxiliary police officers are covered as employees under the Workmen's Compensation Act, it is further suggested that you contact Mr. William Zoe of the City Finance Committee to ascertain what funds are presently available with which to pay out any compensation awards.

We have been informed that the auxiliary police officers will occasionally ride as passengers in what would normally be a one-man squad car. Our opinion is that at those times they will not be performing their official duties as set forth by the statute which authorizes their existence (Ill. Rev. Sat. 1967, ch. 24, par. 3-6-5). The statute provides that they only can "aid or direct traffic" or "aid in control of natural or man-made disasters" or "to aid in case of civil disorder". The statute goes on to state that the Superintendent may assign these officers to perform normal and regular police duties where it becomes "impractical" for regular members to perform those duties. An auxiliary police officer riding as a passenger in what would normally be a one-man car is not riding there because it is impractical, because there would never be a regular officer riding as passenger in a one-man car. Consequently, auxiliary officers should be utilized with caution under such circumstances.

INDEMNIFICATION OF AUXILIARY POLICE OFFICERS

(Superintendent of Police—S. S., M. E. A.—October 16, 1968)

Reference is made to your letter dated September 25, 1968 in which you request an opinion as to whether the City would be required to indemnify auxiliary police officers.

Section 1-4-5 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, ch. 24, par. 1-4-5) provides, in part:

> "In case any injury to the person or property of another is caused by a *member of the police department* of a municipality having a population of 500,000 or over, while the member is engaged in the performance of his *duties as policeman,* and without the contributory negligence of the injured person or the owner of the injured property, or the agent or servant of the injured person or owner, the municipality in whose behalf the member of the municipal police department is performing his duties as policeman shall indemnify the policeman for any judgment recovered against him as the result of such injury, except where the injury results from the wilful misconduct of the policeman." (Emphasis added.)

This section, therefore, indemnifies a "member of the police department" while carrying out his "duties as policeman."

However, new Section 3-6-5 which authorizes the appointment of auxiliary policemen, states that "such auxiliary policemen shall not be members of the regular police department of the municipality."

Since auxiliary policemen would not be members of the "regular" police department, the issue is whether they would be actual "members" of the police department at all, as provided in Section 1-4-5.

Our opinion is that auxiliary policemen would not be "members" of the police department within the meaning of Section 1-4-5, and, consequently, the City would not be required to indemnify them for liabilities incurred within the course of their employment.

However, Section 2-302 of the Local Government Act (Ill. Rev. Stat. 1967, ch. 85, par. 2-302) provides:

> "If any claim or action is instituted against an employee or former employee of a local public entity based on an injury allegedly arising out of an act or omission occurring within the scope of his employment as such employee, the entity may elect to do any one or more of the following:
>
> a) Appear and defend against the claim or action;
>
> b) Indemnify the employee or former employee for his court costs incurred in the defense of such claim or action;
>
> c) Pay, or indemnify the employee or former employee for a judgment based on such claim or action, or
>
> d) Pay, or indemnify the employee or former employee for, a compromise or settlement of such a claim or action."

Therefore, as provided in Section 2-302, the City "may" indemnify these employees at its option, but, as stated above, such indemnification would not be mandatory.

POWERS OF JUNIOR COLLEGE SECURITY OFFICIALS

(Executive Assistant to the Superintendent of Police—M. E. A.—May 4, 1970)

Reference is made to your letter of April 30, 1970 in which you request our opinion as to the construction of newly enacted Ill. Rev. Stat. 1969, Ch. 122, §103-42.1. Specifically, you ask whether security officials of the Junior Colleges "have all powers possessed by policemen at all times or do they possess these powers only when acting directly in the protection of Junior College properties, interest, students and personnel?"

In our opinion these officials have police powers "when such power is required for the protection of Junior College properties and interest and its students and personnel." They also have general police powers in the county where the Junior College is located when they are requested to act by "appropriate State or local law enforcement officials". They do not have all police powers at all times.

EMPLOYMENT OF PART TIME POLICE OFFICERS

(City Attorney, Kenosha, Wisconsin—F. V. K.—May 14, 1969)

Your recent letter addressed to the Corporation Counsel of the City of Chicago has been referred to the undersigned for response. You request a copy of an ordinance or regulation the City of Chicago may have in regard to limiting the types of employment that part-time police officers may obtain.

The City of Chicago does not employ part-time policemen; Illinois municipalities do not presently have the statutory authority to do so. See, *e.g.*, Chapter 24, section 10-2.1-4 of the Illinois Revised Statutes (1967), as construed in *People ex Rel. Gasparas* v. *Village of Justice*, 88 Ill. App. 2d 227 (1967), wherein the Illinois Appellate Court concluded that the statute conferred no authority for municipalities to appoint and hire part-time policemen.

Chicago Police Department regulations control the type of outside employment full-time police officers can obtain when they are off duty. For example, under Rule 17 of the Rules of Conduct, engaging directly or indirectly in the ownership, maintenance, or operation of a taxicab, tavern or retail liquor establishment, is prohibited as secondary employment for Chicago Policemen; they may engage in other types of employment, however, provided that the procedures found in Chicago Police Department General Order Number 68-7 are followed, a copy of which is enclosed.

Also enclosed is a copy of Chicago Police Department Special Order Number 68-54, which provides a Special Employment Program for police officers, allowing them to work as police officers beyond regular duty hours, which may be of interest to you.

SOLICITATION OF DRINKS IN TAVERNS PROHIBITED

(Superintendent of Police—G. F. H., W. R. Q.—October 12, 1971)

In response to your letter of August 11, 1971, it is the position of the Corporation Counsel that those sections of Section 147-15 of the Municipal Code of Chicago pertaining to prohibition of permitting solicitation and solicitation of drinks in taverns are constitutional.

In the case of *City of Chicago* v. *Bonanno, et al.*, 71 MC 542326, etc., the Assistant Corporation Counsel was apparently under the impression that the decision in *McCummon* v. *Daley*, U.S. Dist. Ct. No. 68 C 1665, invalidated all of Section 147-15. However, that decision invalidated only the first portion of the

ordinance which prohibited employment of females in taverns, and left the remaining provisions of the ordinance intact and in force.

The constitutional attack on these provisions of Section 147-15 contained in the Memorandum of Law filed in the *Bonanno* case is, in the opinion of this office, without merit. The ordinance is not void for vagueness since the definition of the word "solicit" has been held to be universally understood. *People* v. *Rice,* 383 Ill. 584. Contrary to the position taken in the *Bonanno* memorandum, the ordinance does not prohibit a waitress from taking an order. See *Henson* v. *City of Chicago,* 415 Ill. 564. Nor do the pertinent provisions of the ordinance discriminate in terms of employment on the basis of sex since there is no question of employment involved. There is also no infringement of the freedom to associate because the ordinance prohibits solicitation, not association.

For the foregoing reasons, there is no obstacle to the continued enforcement of those sections of the ordinance prohibiting solicitation and permitting solicitation of drinks in taverns.

Finally, it was the decision of this office to forego an appeal in the *Bonanno* case since the state of the record in that case could have minimized the chances of success on appeal. However, appropriate proceedings have been commenced to revoke the tavern's liquor license.

SPECIAL POLICEMEN IN LABOR UNIONS

(R. L. M.—M. E. A.—August 4, 1969)

Reference is made to your letter of July 24, 1969, in which you request our opinion as to whether special policemen employed by the University of Chicago may join or participate in the activities of a labor union without violating the Municipal Code of the City of Chicago or police regulations.

Please be advised that the Corporation Counsel of the City of Chicago is authorized to render legal opinions only when requested to do so by the Mayor or other City official. However, you do raise a most interesting problem and we would be grateful to have your views on this matter.

SEAPORT SPECIAL POLICE

(Superintendent of Police—G. F. H.—June 9, 1972)

Initially, in response to your letter of May 2, 1972, requesting clarification of the procedures involved in the appointment of special policemen by the director of the Port of Chicago pursuant to Chapter 8.3 of the Municipal Code, this office is of the opinion that persons so appointed fall within the purview of the definition of "special policemen" contained in Chapter 173, par. 1 of the Municipal Code of Chicago. However, since such special policemen are appointed for the purpose of protecting persons, passengers and property being transported in interstate and intrastate commerce by common carrier, such special policemen are exempt from the requirement of obtaining a license by virtue of paragraph 2 of Chapter 173.

Such special policemen, even though exempted from the license requirement, are nevertheless required to comply with all other provisions of the chapter applicable to them. Chapter 173, par. 2, Municipal Code of Chicago. Thus, in the case of persons nominated or designated by the Port Director for appointment as special policemen, all the provisions of Chapter 173 are applicable except the license requirement of Section 173-2 and the bond requirement of

Section 173-8, which requirement is suspended in the case of seaport special policemen by Section 8.3-3 of the Municipal Code.

Having determined that Chapter 173, with the two exceptions noted, applies to persons appointed as seaport special policemen for the specific purposes set forth in Section 8.3-3, such special policemen are subject to all the rules and regulations of the Police Department as well as such additional rules and regulations that the Superintendent of Police may make concerning such special policemen (Section 173-11 of the Municipal Code of Chicago). Thus, although seaport special policemen are peace officers and may carry concealed weapons without violating the laws of this State (see Ill. Rev. Stat. 1971, ch. 38, pars. 2-13, 24-2(1)) or the ordinances of the City (see Municipal Code of Chicago, ch. 193, par. 30), the time, place, and manner in which such persons shall carry weapons is a matter of policy to be decided upon and regulated by the Superintendent of Police. (See Opinions of the Corporation Counsel, Vol. 24, pp. 518-19.) Any such rules and regulations should, of course, be made with a view toward the limited jurisdiction (in and about the harbors and rivers of the City) of such seaport special policemen. (See Section 8.3-3 of the Municipal Code.)

In summary, this office is of the opinion that Section 8.3-3 of the Municipal Code gives the Port Director the authority to nominate or designate persons for the position of seaport special policemen, but Chapter 173 remains the controlling law as to procedures for appointment and subsequent regulation of such appointees. Therefore, the "appointment form" attached to your letter could only have legal significance as a "nominating form" from the Port Director to the Superintendent of Police, and the appointment of a seaport special policeman could only become legally effective upon the issuance by the Superintendent of Police of a certificate of appointment pursuant to Section 173-7 of the Municipal Code.

CITY OF CHICAGO v. DICK GREGORY

(City Council—H. C. G.—January 22, 1968)

On January 19, 1968, the Supreme Court of Illinois rendered an opinion which affirmed a judgment entered on a jury verdict in the Municipal Division of the Circuit Court of Cook County.

The defendants were charged with violating two provisions of the disorderly conduct ordinance (Sec. 193-1 of the Municipal Code of Chicago). Succinctly, the facts were: the defendants marched around the block wherein the Mayor of Chicago resided; ostensibly, they were protesting the retention of Dr. Benjamin J. Willis as Superintendent of Schools. When the hostile spectators became extremely threatening, the police, who were protecting the defendants, requested them to leave the neighborhood in order to prevent a riot. The defendants insisted on continuing their activities and they were then arrested.

The Supreme Court of Illinois found that there was an imminent threat of violence, that the police had made every reasonable effort to protect the defendants and had explained the reason for the request to cease the demonstration. The Court held that under these circumstances the defendants were not denied any right of free speech, free assembly or freedom to petition for redress of grievances.

SCHNELL v. CITY OF CHICAGO

(City Council—S. S.—March 20, 1969)

The United States Court of Appeals rendered the attached opinion on March 17, 1969.

The complaint, a class action, was filed in the Federal District Court during the 1968 Democratic Convention. The complaint alleged that members of the news media were assaulted by police officers during the course of their news gathering and that consequently their civil rights were violated. The complaint was dismissed by District Court and the plaintiffs appealed.

The Court of Appeals reversed and remanded, holding that the complaint did state a cause of action under the Civil Rights Act and, therefore, the case should be tried on its merits.

ADULT CINEMA CLUBS—NUDE STAGE SHOWS

(Superintendent of Police—R. F. F.—June 15, 1971)

This is in response to your inquiry of May 20, 1971. You state that "Adult Cinema Clubs" are being formed; that these clubs attempt the appearance of being private organizations, and that they intend to show "stag films." You also state you have information that taverns in Chicago intend to introduce nude stage shows.

1. What laws, if any, are violated by operators of private stag film clubs?

Operators of such "clubs" may be charged with violation of Section 11-20 of the Illinois Criminal Code or Section 192-9 of the Municipal Code of Chicago if the films being shown are obscene.

That the clubs are "private" is of no import. Their claim of privacy is an apparent attempt to take advantage of the United States Supreme Court's opinion in *Stanley* v. *Georgia,* 394 U. S. 557 (1969). That case held that a person cannot be arrested for keeping obscene materials in the privacy of his own home. However, the auditorium of an "Adult Cinema Club" is not the same as a private home. Such clubs are operated for profit. In a very recent opinion the United States Supreme Court has limited the operation of *Stanley* to private homes and has specifically stated that that case does not apply to obscene materials intended for commercial distribution. *United States* v. *Thirty-Seven Photographs,* 39 USLW 4518 May 4, 1971) and *United States* v. *Reidel,* 39 USLW 4523 (May 4, 1971).

It should be noted that although the operators of such a club may be arrested for violating the statute and ordinance cited, the films being shown may not be seized without a prior adversary hearing. See approved letter to James B. Conlisk, Jr. of August 11, 1970.

2. What laws, if any, are violated by operators of and participants in nude shows?

If the show is obscene, persons operating or participating in them may be charged with violating Section 11-20 of the Illinois Criminal Code or Sections 192-8 or 192-9 of the Municipal Code of Chicago.

CONSTRUCTION OF OUTDOOR FIRING RANGE

(Director of Training, Chicago Police Department—H. N. L.—December 14, 1971)

I am writing you this letter in response to your memo requesting an opinion as to the legality of the construction of a proposed outdoor firing range by the Illinois Central Railroad at 121st Street between Indiana Avenue and the C&EI Railroad tracks.

There are several ordinances and legal doctrines that must be considered prior to the construction of this firing range. The first of these is the zoning requirements.

You described the property as land ". . . at 121st Street between Indiana Avenue and the C&EI Railroad tracks." In checking the zoning map I found that there are no C&EI railroad tracks indicated on the map. I assume that the area referred to is the area between the I. C. Railroad tracks and the C&WI railroad tracks. The rest of this opinion will be based on that assumption.

The area is zoned M3-3—heavy manufacturing district. Assistant zoning administrator, Harry Manley has informed me that it appears that the firing range would be classified as a trade school, which is a permitted use in an M3 district. There is one limitation on the location of the facility. Section 10.3-3 provides that within 300 feet of a residence district, a facility such as the proposed one may only be located within a completely enclosed building. Due to the fact that an outdoor range is contemplated, the facility must be located more than 300 feet from the nearest R. district. The nearest R. district is located immediately east of the I.C. railroad tracks at 121st Street. The range would have to be at least 300 feet from that district.

Another restriction on the firing range other than the location limitation which has been mentioned, is the noise limitations in the zoning ordinance. In Section 10.5-3 a chart is given of maximum noise limitations that are allowed at the boundary of the nearest R. district. In addition to these noise requirements in the zoning ordinance, the firing range would have to comply with the City's noise pollution ordinance. Here again the noise along the nearest R, B or C boundary would have to be below the standards set in Section 4.14 of the noise pollution ordinance (Municipal Code of the City of Chicago, Sec. 17-4.14).

The above limitations are not the only limitations on the firing range. The Municipal Code provides for the licensing of firing ranges in Sec. 170. The provisions of that section call for a license application, safety inspection, frontage consents and a license fee. A firing range license would have to be obtained before the facility is opened.

Finally, it should be noted that it is of paramount importance that proper safety precautions be taken. Even though adequate back stops are provided and precautions are taken to prevent trespassers, there is always the possibility of some unforeseen event or circumstance causing injury to third persons or to the users of the range themselves.

GIFT OF WINE WITH MAJOR PURCHASE

(Director, Vice Control Division, Department of Police—A. H.— December 29, 1967)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, seeking an opinion as to whether a purported gift of a case of wine to persons making a major purchase at Polk Bros. Stores violates the law, has been referred to the undersigned for consideration and response.

You have attached to your letter a copy of an advertisement concerning the above-described activity in which the following legend appears, among others:

"FREE! With Any Major Purchase at POLK BROS.

A 12-bottle assorted case of
ITALIAN SWISS COLONY
NAPA SONOMA MENDOCINO
CALIFORNIA TABLE WINES

Have a toast of this award winning wine to the grand opening of the new store. Enjoy as our gift the robust, mellow red, the more delicate white, the piquantly dry vin rose. Made from the most highly prized of all the grapes, these premium table wines come from the loveliest vineyards in all the land.

Limited to purchasers over 21 years of age."

Although the advertisement appears to denote a "gift" of a case of wine, it is readily apparent that one must not only be a purchaser of Polk Bros. merchandise, but must consummate a "major" purchase. Quite clearly, such a "gift" requires a consideration passing from the so-called "donee" to the alleged "donor." Although the "donee" may not pay an outright price for the "gift," the price may be considered as contained within the cost of the "major" purchase. The law recognizes that there need not be a direct monetary consideration; said consideration may consist of a benefit to the person conducting the transaction or an inconvenience or disadvantage to the putative "donee." Such a transaction, if continued, might well be considered as a shift or device to avoid the appearance of a sale of alcoholic beverages (*c.f.*, Ill. Rev. Stat. 1967, ch. 43, par. 177) and as an actual "sale" or "purchase" (*c.f.*, Ill. Rev. Stat. 1967, ch. 26, par. 1-201(32)).

Moreover, the Illinois Liquor Control Act, in Article II, Section 1 (Ill. Rev. Stat. 1967, ch. 43, par. 96) makes it illegal for any person to sell or barter alcoholic beverages, and also makes it illegal for persons to deliver, furnish or possess alcohol for beverage purposes except as specifically provided in the Act.

Under the facts contained in the 15th District Commander's report attached to your letter, a Polk Bros. salesman "furnished, delivered and possessed," if not indeed "sold," a case of wine which was purported to be the "gift" to a purchaser of a refrigerator upon completion of the transaction. It is our opinion that such a transaction, in the absence of State and City licenses, is contrary to law and should be discontinued in the future.

The foregoing conclusion is consonant with a previous opinion rendered by the Corporation Counsel (18 Op. Corp. Couns. 491, No. 8983, December 20, 1935), in which the absence of a State and City retail dealer's license in the "gift" of alcoholic beverages with the purchase of admission tickets to a theatre was considered contrary to law.

SALE OF PACKAGED ALCOHOL BY MINORS IN SUPERMARKET

(Director, Vice Control Division, Department of Police—A. H.—January 4, 1968)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, seeking an opinion with respect to female minors selling packaged alcoholic beverages, has been referred to the undersigned for consideration and response.

You state that the Police Department has received inquiries with regard to the legality of female employees of food stores under the age of 18 years who, in the ordinary course of checking out food purchases, also collect money for various types of packaged alcoholic beverages. You ask whether such action is in violation of the law.

Chapter 147, Section 147-14 of the Municipal Code of Chicago provides, in part, as follows:

". . . Any minor engaged or employed or permitted to work in or upon the licensed premises where the sale of alcoholic liquor is not the main or principal business may not work as entertainer, host or hostess or in connection with the handling, selling, serving or delivering of alcoholic liquor."

From the language above-quoted, it appears that the City Council intended all sales of alcoholic beverages to be handled, sold and delivered only by persons who have reached their majority, whether such a transaction is consummated upon premises where the principal business is the sale of alcoholic liquor, or not.

We must conclude, therefore, that the sale of packaged alcoholic beverages by minors, whether in a super market or elsewhere, is illegal and should be discontinued. We note in passing that many retail establishments at present sell alcoholic beverages only through specified check-out counters which are operated by adults, a system which is, of course, within the law.

TOWING RATES OF VEHICLES ILLEGALLY PARKED ON PRIVATE PROPERTY

(Acting Commander 18th District, Department of Police—H. L. R.—January 11, 1968)

Your letter of December 19, 1967, addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, has been referred to the undersigned for response. In your letter, you ask whether the City may establish a ceiling on the price charged for the towing of vehicles illegally parked on private property.

The City has no authority to set either towing or storage rates for the type of vehicles which you describe. It is interesting to note that Section 3 (i) of the Illinois Motor Carrier of Property Act (Ill. Rev. Stat. 1967, ch. 95½, par. 283.3 (i)) explicitly excludes tow vehicles from the rate regulation prescribed by the above mentioned Act. Your letter states that you have received complaints from citizens who acknowledge that they parked on private property in direct contravention of posted warnings, but who feel that the towing and garage rates were excessive. These complaints are private legal matters between the complainants and the towing company, and not within the authority of the City of Chicago.

Section C. BOARD OF HEALTH

OUTDOOR PLAY AREAS OF DAY CARE CENTERS

(Commissioner of Health—A. H.—October 20, 1967)

Your request for a legal interpretation of the Chicago Board of Health Rules and Regulations pertaining to outdoor play areas required for day care centers, addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, has been referred to the undersigned for consideration and response. You ask whether a day care center which has no adjoining outdoor play area could be approved for licensure and whether a park or playground not connected with said day care center, but approved by the Health Department or the Department of Public Welfare, would be acceptable as an alternative to the required outdoor area.

An examination of Chicago Board of Health Rules and Regulations for the Conduct of Day Nurseries, particularly the provisions of Section II-F, relating to said required outdoor space and the commentary which follows under the heading "Satisfactory Compliance," Item 4, supports the conclusion that a day care center would be in compliance with the rules and can be licensed by the Board of Health if it has access to a park or playground used for play or recreation which has been approved by the Board of Health or the Department of Public Welfare, and provided it complies with the other conditions set forth under said Rules and Regulations.

SECURING CONSENT OF PATIENTS— AUTHORIZATION FORMS

(Commissioner of Health—A. H.—November 22, 1967)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, seeking an opinion with respect to proposed hospital authorization forms and the necessity for securing consent of patients, parents or guardians under certain circumstances, has been referred to the undersigned for consideration and response.

Your letter notes that, under previous procedures, the Chicago Board of Health paid for all hospital cases which it authorized on Forms 65-01 and 601-1, which you have attached. You state that the Board now seeks to require hospitals to refund to the Board of Health, at a later date, payments in those cases which subsequently become the responsibility of the Public Aid Department of Cook County. You propose six new clauses for Forms 65-01 and 601-1, which would be substituted for the language now contained under the heading "Authorization" thereon, and ask that this office render an opinion as to the form and legality of said new clauses.

An examination of the proposed six clauses to which you refer reveals language which would secure not only reimbursement for hospitalization payments where the Department of Public Aid assumes responsibility for payment, as shown in Clause 3, but also reimbursement for hospitalization payments in those cases where the patient possesses hospital or medical insurance, to the extent that said insurance covers said hospital treatment, as set forth in Clause 5. Analysis of pamphlets entitled "Policies and Procedures Relating to Grants for Maternity and Infant Care Projects" (Project 502), and "Grants for Comprehensive Health Services for Children and Youth" (Project 601), published by the United States Department of Health, Education and Welfare, indicates, under Chapter XII, Paragraph D for Project 502, and Chapter XI, Paragraph D for Project 601, that income or collections will be made in the course of the project, which are to be credited to the Federal account. This policy reflects an intent to seek and collect, where possible, reimbursement from available sources. Under these circumstances, assuming that Clause 5 is to be included, it is our opinion that the six proposed clauses intended to replace the present paragraph appearing under the heading "Authorization" are proper as to form and legality.

You also note that those patients receiving hospital care must sign for those hospitals rendering care a "Patient request for hospitalization." You ask whether, in view of the required signature for hospitals generally, the signature of the patient, parent or guardian shall be requested by the Chicago Board of Health. It is our opinion that since the authorization for hospital care is initiated under a specific project number as well as under the aegis of the Board of Health, it is desirable that the Board of Health maintain a record of its own showing the request for outpatient or inpatient care signed by the patient, or where the patient is a minor, by his or her parent or guardian, which will serve to preclude future misunderstandings.

We note further that in the present patient request for hospitalization, the following statement appears:

"I hereby request outpatient and/or inpatient hospital care for the above patients. I understand payment for this care will be made by the Chicago Board of Health or by hospitalization insurance or by a combination of these sources and that no charge will be made to me."

Inasmuch as the Board of Health in its proposed new Clause 3 contemplates reimbursement from the Cook County Department of Public Aid when such reimbursement is available, it is suggested that the language showing payment for care as quoted above include the possibility of payment by the Department of Public Aid as well.

HOSPITAL DEFINED

(Commissioner of Health—M. C. H.—May 14, 1969)

This is to acknowledge receipt of your letter to this office in which our opinion is requested as to whether or not a certain facility operated by the Salvation Army, in which detoxification treatment is given, should be considered as a hospital.

Section 3(A) of the Illinois Hospital Licensing Act (Ill. Rev. Stat. 1967, ch. 111½, par. 144(A)) defines "hospital," in part, as follows:

> "(A) 'Hospital' means any institution, place, building, or agency, public or private, whether organized for profit or not, devoted primarily to the maintenance and operation of facilities for the diagnosis and treatment or care of two or more unrelated persons admitted for overnight stay or longer in order to obtain medical, including obstetric, psychiatric and nursing, care of illness, disease, injury, infirmity, or deformity. . . ."

Chapter 137, Section 137-1 of the Municipal Code of Chicago defines "hospital" as follows:

> "The word 'hospital' is hereby defined to mean any institution or place used for the harboring or the reception, care, and treatment, including treatment known as rest cure, physical culture, hydropathic massage, and all other forms of drugless "treatment, of two or more persons suffering from or afflicted with any mental or physical disease, bodily injury, alcohol or drug addiction; or any institution or place for the care of one or more pregnant women during confinement; or any place or establishment advertised, announced, conducted, or maintained under the name 'hospital' without a qualifying statement that such hospital is not intended for human beings."

It is our opinion that if the Salvation Army facility above mentioned is giving detoxification treatments, it falls within the above-cited definitions of "hospital" and should first obtain a city license before any such treatment is given.

ADMISSION POLICIES OF HOSPITALS

(Commissioner of Health—C. J. O.—May 12, 1969)

Your investigation report relative to the Albert Merritt Billings Hospital addressed to Richard J. Daley, Mayor of the City of Chicago, has been referred to the office of the Corporation Counsel for review.

The pertinent facts set forth in your report are as follows:

> ". . . Mrs. Lucille Colyer, wife of Mr. Colyer, stated that her husband was denied admission to the above-mentioned hospital because of his inability to pay a sum of money prior to admission, and that this delay of admission and treatment contributed to or resulted in his death from pneumonia on December 13, 1968 at Cook County Hospital.
>
> "A Chicago Board of Health representative interviewed Mr. Regis Kenna who is in charge of emergency room operations at the Albert Merritt Billings Hospital. The emergency room record of Mr. Colyer was reviewed. According to the record, he was seen and examined by the emergency room physician, Dr. A. Jacobson, on December 10, 1968 at 8:20 p.m. Mr. Colyer had a temperature of 103.8 degrees, pulse 120, respiration 34 per minute, blood pressure 180/120, and was acutely ill. An X-ray of the chest revealed a congestion in the right lung. A diagnosis of Staphlococcal Pneumonia was made by the responsible physician. The disposition states: Sent to Cook County Hospital. Inadmissible, Mr. Regis stated that an isolation bed was not available for Mr. Colyer on that date."

Under the common law a hospital is not required to admit all patients. This rule was modified, however, by Chapter 111½, Section 86 of the Illinois Revised Statutes, 1967, which provides as follows:

> "Hospitals to furnish first aid.] § 1. No hospital, either public or private where surgical operations are performed, operating in this State shall refuse to give emergency medical treatment or first aid to any applicant who applies for the same in case of injury or acute medical condition where the same is liable to cause death or severe injury or serious illness."

It is alleged that the patient in the instant case was denied admission because of his inability to pay for medical attention. The hospital states that isolation facilities were not available.

The hospital was not required to admit the patient, but to render sufficient emergency medical treatment. Your report does not suggest what, if any, emergency treatment should have been given.

Further, the availability of isolation facilities should be verified. If Staphlococcal Pneumonia is a contagious, infectious, or communicable disease, then Paragraph 137-11 of the Municipal Code of the City of Chicago requires the isolation of these patients, as does Part II, Section E of the "Hospital Licensing Act and Requirements" published by the Department of Public Health of the State of Illinois.

Until a verification of the isolation factor is made, and a suggestion as to what emergency treatment might or should have been given, we recommend that no legal action be taken in the instant matter.

DUTY OF HOSPITALS TO INDIVIDUALS INJURED OUTSIDE ITS PREMISES

(Commissioner of Health—M. S.—June 5, 1973)

Your letter of May 29, 1973, addressed to Richard L. Curry, Corporation Counsel, together with the attached transcript have been submitted to the undersigned for review and answer.

Your letter requests that our office review the transcript and advise you whether the Chicago Board of Health should initiate any further action.

The transcript concerns an investigative hearing in the actions of employees of the Northeast Community Hospital regarding one Irving Lasky who had been injured in front or near the hospital. The allegation made is that upon being notified of the accident the Hospital refused to send a Doctor or nurse to the scene and that when Mr. Lasky was brought into the emergency room of the hospital by the Fire Department he was dead.

A review of the applicable statutes and ordinances reveals that there was no legal duty or obligation upon the hospital to render aid and assistance to one injured outside its premises.

The testimony and evidence as revealed in the transcript indicates that when the hospital was notified, they immediately called for a Fire Ambulance, prepared the emergency room and notified the doctor on duty. That a period of from five to ten minutes elapsed from the time of notification to the time the patient was brought into the hospital. The transcript further reveals that there was only one doctor on duty for the entire hospital to attend the emergency room and a number of patients who were in the intensive care unit of the hospital and that to permit their only doctor to leave the premises may endanger the welfare of their patients and would leave the emergency room unattended.

Under the circumstances there was no legal wrong-doing on the part of the hospital and we can find no further action that the Board of Health can legally take.

EXAMINATION OF HEALTH DEPARTMENT RECORDS

(Commissioner of Health—A. H.—September 18, 1967)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel, requesting an opinion with respect to inspection of hospital records, has been referred to the undersigned for consideration and response.

You state that Project 601 of the Chicago Board of Health has recently received requests from an attorney and a physician seeking information and summaries relating to clinical and laboratory findings involving a patient being treated under said Project for suspected lead-poisoning; that the records are kept at the Municipal Contagious Hospital of Chicago where your lead-poisoning treatment center is located; and you attach copies of said requests. You ask for an opinion as to the proper legal procedure of handling these requests.

Reference must first be made to those statutory and ordinance provisions which bear upon the subject matter. Project 601 proceeds under Title V, Section 532 of the Social Security Act (42 U.S.C.A. 729-1). An examination of that statutory provision makes no reference to patient records or record keeping by any State health agency or health agency of any political subdivision of the State; however, under the Policies and Procedures involving Grants for Comprehensive Health Services for Children and Youth (published by the United States Department of Health, Education and Welfare, Welfare Administration, Children's Bureau, Article XII. Records, subparagraph A. Patient Records), a health and medical record is required to be established for each patient accepted by the Project for care, to contain all information relative to the patient needed to assure comprehensiveness and continuity of care, which record is to be used as an administrative as well as a medical management tool. Nothing contained within either the statute or rule provisions above cited require or prohibit the availability of medical records for inspection by attorneys or physicians who are not directly involved in the Project.

The foregoing requirement of keeping patient records is in consonance with Section 4-24 of the Illinois Public Assistance Code (Ill. Rev. Stat. 1965, ch. 23, par. 424), and with Section 137-14 of Chapter 137, Municipal Code of Chicago, dealing with hospitals in general.

The nature of record keeping generally, insofar as it may be considered public, quasi-public, or private, must next be considered with respect to patients' records maintained by hospitals. Reference to Section 3 of the State Records Act (Ill. Rev. Stat. 1965, ch. 116, par. 43.6) reveals the public policy of the State of Illinois to include as public records, open to public inspection, certain records relating to the expenditure or receipt of public funds, with the condition that this provision must not be construed as limiting any right given by any other statute or rule of law with respect to inspection of other types of records. In the case of county hospitals and hospitals organized for non-profit, as an illustration, any party to a cause pending in a Court against whom a claim shall be therein asserted for damages resulting from such injuries shall, upon request in writing, be permitted to examine the records of such hospital in reference to such treatment, care and maintenance of such injured person (Ill. Rev. Stat. 1965, ch. 82, par. 99).

Although the policy of the above-cited statute is to give the right of inspection of hospital records to persons against whom a claim may be asserted, it would seem a reasonable interpretation that a patient, who is the subject of care and treatment at such a hospital, should also be allowed access to such records as relate to him, upon proper authorization and related circumstances. The foregoing conclusion is consistent with previous opinions rendered by this office wherein it was stated that a person is entitled to examine Health Department records if he can show some personal right to be involved in the particular records he desires to examine (18 Op. Corp. Coun. 114, Nos. 7833, 6901; 13 Op. Corp. Coun. 224).

The foregoing conclusion is not intended to imply, however, that Chicago Board of Health may not impose reasonable rules and regulations with regard to examination of records kept by institutions maintained under its direct supervision and control. Any request for permission to examine records, for example, should be accompanied by a written authorization so to do, signed by the patient if of legal age, or by his parent or guardian as next friend. Said authorization in the latter instance should indicate the capacity in which the signature has been supplied. The authorization must then be examined by the physician in charge of the case, who should also grant his permission, in keeping with the rules of ethics governing both the medical and legal professions (See, *e.g.*, National Interprofessional Code for Physicians and Attorneys), unless said record contains matters which are inimical to the public health or welfare. The request may be honored only to the extent that the report relates to the patient alone.

In allowing inspection of said records, care must be taken that no part of a medical report is permitted to be inspected which contains information, interviews, reports, statements, memoranda or other data of the Illinois Department of Public Health, Illinois State Medical Society, allied medical societies, or in-hospital staff committees of accredited hospitals, used in the course of medical study for the purpose of reducing morbidity or mortality in medical research, as that prohibition exists in Section 1 of an Act providing for the confidential character of medical studies (Ill. Rev. Stat. 1965, ch. 51, par. 101).

Finally, neither the Chicago Board of Health, nor the Contagious Disease Hospital, nor the Project 601 staff is obligated to furnish summaries or synopses of said medical records, nor should said medical records be permitted to be removed from their official place of keeping in the absence of an order of a Court as contemplated by Rule 214 of the Illinois Supreme Court, which provides for the production of certain documents for the purpose of inspection, copying, reproduction, and photographing said documents whenever the nature, contents or condition of said documents is relevant to the subject matter of the action, only upon hearing before the Court.

We have examined the letter of Attorney Kenneth S. Lewis, together with the authorization for medical reports and records, and find that the signature relating to the authorization fails to set forth the legal status and relationship of Jacqueline George to the patient, Anthony George, insofar as the absence of her designation, on the authorization, as mother and next friend of the patient, if that is her status, and the request for information was therefore properly refused. We have also examined the request for information written by Dr. Nathaniel D. Greenberg, who seeks to evaluate the records of Anthony George and asks for a summary of clinical and laboratory findings. This request may also properly be refused; however, should said request be renewed, with an authorization of the parent of the child thereon set forth, as indicated above, Dr. Greenberg may examine the records as outlined above. In both instances, the attending doctor or doctor in charge of the case should also be requested to authorize the examination of said records.

EMERGENCY SERVICE PLAN

(Commissioner of Health—F. G. S.—April 6, 1972)

Your memorandum of March 3, 1972, addressed to Richard L. Curry, Corporation Counsel, requesting an opinion on the legality of an "Area Wide Emergency Service Plan" submitted by the North Side Commission on Health Planning, has been referred to the undersigned for attention and reply.

With your memorandum you enclosed a copy of the proposed plan, a list of hospitals included in the plan, numbering fourteen, and a map delineating the area to be covered by the plan. The plan calls for classifying hospitals insofar as

emergency services are concerned, as being type A, B, or C. The map you submitted indicates that four hospitals would be classified as type A, three hospitals would be classified as type B and seven hospitals would be classified as type C. The plan calls for bypassing hospitals classified as type C, when handling emergency cases and the delivery of these cases to the better equipped and staffed hospitals classified as type A and B in the proposal.

You state that at the request of the Fire Department and Police Department, the Board of Health wishes to obtain an opinion regarding the legality of such a plan as against the present procedure of transporting a sick or injured person to the nearest regularly licensed hospital that will receive him. You further inquire about any liability that might arise in the event of a death of a person who has been transported by one hospital enroute to an approved hospital.

We have reviewed Chapter 111½, Sections 86, 86.1, 86.2 and 87 (see Rev. Stats. 1971) dealing with Emergency Medical Treatment and "Part VII—General Hospital Emergency Service", of the Hospital Licensing Requirements of the State of Illinois Department of Public Health, as revised September 1, 1970 and effective September 10, 1970, adopted pursuant to the statutory provisions cited above, and the "Emergency Room Plan" of the Chicago North Side Commission on Health Planning. Neither the statute nor the documents cited above contain any provisions regarding the matter you raise, namely, bypassing hospitals classified as type C and the delivery of emergency cases in the initial instance to better equipped and staffed hospitals classified as type A and B in the proposal.

Chapter 103, Section 103-16 of the Municipal Code of Chicago provides as follows:

> "103-16. No sick or injured person shall be conveyed against his will by any ambulance, from the place where he was overcome by sickness or from the scene of the accident in which he was injured, nor, having been placed in an ambulance, shall be conveyed to a place to which he is unwilling to go, provided, that if such sick or injured person is unable to give any direction in his own behalf and there is no immediate relative present to direct where he shall be taken, *such sick or injured person shall be conveyed to the nearest regularly licensed hospital that will receive him.*" (Emphasis added).

In view of the above cited provision of the Municipal Code of Chicago it is our opinion that a person who is sick or injured could be transported to a hospital classified as type A or B, instead of a hospital classified as type C, provided said person gives his consent or if he is unable to do so, an immediate relative directs that the sick or injured person may be taken to such hospital instead of a type C hospital which might be the nearest hospital.

In circumstances where the sick or injured person is unable to give any direction and there is no immediate relative present to direct where he shall be taken, such sick or injured person would have to be conveyed to the "nearest regularly licensed hospital that will receive him."

It would be our further opinion that in an emergency situation, the individual's physician or a physician conversant with the nature of the illness or injury could, on the basis of the medical facts known to him, direct that the person be taken to a hospital able to provide the emergency medical services needed, not necessarily the nearest hospital. Likewise, if for valid medical reasons the nearest hospital would not receive the person, he could be transported to another hospital.

Insofar as inter-hospital transfers are concerned, we note that paragraph 7-3.3 (g) of the plan provides in part that,

> "After emergency care has been given, patients may be transferred to their local hospital or the hospital which has granted privileges to their personal physician subject to the patients's physicial condition, *the patient's permission and approval of the patient's physician.*" (Emphasis added).

We are not able to render an opinion with respect to the matter of liability that might arise in the event of a death of a person who had been transported by one hospital enroute to an approved hospital, since liability or non-liability would depend on the circumstances in each individual instance. Assuming compliance with the provisions of paragraph 7-3.3 (g) of the plan, this problem could be obviated if the necessary permission of the patient and approval of the patient's physician are secured.

Aside from the questions you raised upon which we have stated our opinion, it is our further opinion that the Emergency Room Plan otherwise complies with the statute and State of Illinois Department of Public Health Hospital Licensing Requirements and the Municipal Code of Chicago as a voluntary plan among area hospitals to provide improved hospital care for sick and injured patients.

USE OF BOARD OF HEALTH INFANT WELFARE STATION BY ROBERT TAYLOR RESIDENCE HEALTH COMMITTEE

(Commissioner of Health—A. H.—May 10, 1968)

We have your recent letter in which you ask for our comments regarding the proposal made by the Robert Taylor Residents Health Committee in which they request that the Board make its Infant Welfare Station No. 30, located at 37 West 47th Street, available to the Health Committee for evening use as a clinic to be staffed and administered by Committee volunteers.

We note first that the premises are leased by the Board of Health, as lessee, from the Chicago Housing Authority, as lessor. From the copy of the lease of said premises attached to the file it appears that under Clause 10, the lessee shall indemnify the lessor and save it harmless against all liability, claims, damages and causes of action arising out of lessee's possession, maintenance, use and operation of the premises. Also, under Clause 11, the lessee is prohibited from renting, subletting or assigning space in the premises without the written consent of the lessor.

The proposal suggests two principal legal problems: first, whether the Board of Health should expose itself to liability resulting from the activities of the Committee without a con-commitant right to supervise, regulate and control the Committee's activities so as to insure that the level of professional care to be rendered by said Committee will be of the high order generally prevalent in the community; and, second, whether the Board of Health can make said space available in the absence of the written consent of the Chicago Housing Authority under the terms of the lease.

Should the Board of Health be able to arrange the necessary supervision, direction and control above stated, and the able to secure the written consent of the Chicago Housing Authority with respect to the use of said space by another occupant, the matter would then become one of policy to be decided by the Board of Health rather than one of law.

COMMUNITY PLAN FOR FURNISHING OF HOSPITAL EMERGENCY MEDICAL CARE

(Commissioner of Health—F. G. S.—May 17, 1973)

Your letter of April 11, 1973, addressed to Richard L. Curry, Corporation Counsel, together with the attached copy of a letter from the Executive Director of the Chicago North Side Commission on Health Planning addressed to Dr. Eric Oldberg, President of the Chicago Board of Health, has been referred to

the undersigned for attention and reply. You request an opinion as to the status of the Board of Health in the matter raised in the letter of the Executive Director of the Chicago North Side Commission on Health Planning and further request that we advise you as to how the issue should be legally resolved.

Chapter 103, Section 103-6.2 of the Municipal Code of Chicago provides in part as follows:

"103.6.2. The Ambulance services of the Fire Department of the City of Chicago and the Chicago Police Department emergency aid vehicles shall convey a sick or injured person from the place where he was overcome by sickness or from the scene of the accident in which he was injured to the nearest emergency medical facility designated type "A" in those areas of the City of Chicago where a community or areawide plan for the furnishing of hospital emergency medical care is in effect under an agreement between all hospitals in said area, approved by the Chicago Board of Health and the Illinois Department of Public Health pursuant to Chapter 111½, Sections 86, 86.1 and 86.2 (Illinois Revised Statutes 1971), "Emergency Medical Treatment".

"In those areas of the City of Chicago where an approved community or areawide plan for the furnishing of emergency medical care is not in effect, such sick or injured person shall be conveyed to the nearest hospital approved by the Board of Health for the provision of emergency medical care service. (Passed. Coun. J. 8-10-70, p. 8950; amend. 12-15-72, p. 4205.)"

Chapter 111½ Paragraphs 86, 86.1 and 86.2 (Ill. Rev. Stats., 1971) provide as follows:

"86. Hospitals to furnish emergency services.]
§ 1. Every hospital required to be licensed by the Department of Public Health pursuant to the Hospital Licensing Act, approved July 1, 1953, as now or hereafter amended, which provides general medical and surgical hospital services shall provide a hospital emergency service in accordance with rules and regulations adopted by the Department of Public Health and shall furnish such hospital emergency services to any applicant who applies for the same in case of injury or acute medical condition where the same is liable to cause death or severe injury or serious illness.

"86.1. Community or areawide plan for emergency service.]

§ 1.1. A hospital is authorized to participate, in conjunction with one or more other hospitals, in a community or areawide plan for the furnishing of hospital emergency service on a community or areawide basis, provided each hospital participating in such a plan shall furnish such hospital emergency services as it was designated to provide in the plan agreed upon by the participating hospitals to any applicant who applies for the same in case of injury or acute medical condition where the same is liable to cause death or severe injury or serious illness.

"86.2. Community or areawide plans-Submission to department.]

§ 1.2. Community or areawide plans may be developed by the hospitals in the community or area to be served and shall provide for the hospital emergency services which shall be made available by each of the participating hospitals. All such plans shall be submitted to the Department of Public Health for approval prior to such plan becoming effective. The Department of Public Health shall approve such plan for community or areawide hospital emergency service if it finds that the implementation of the proposed plan would provide an adequate hospital emergency service for the people of the community or area to be served."

Neither the state statute nor Chapter 103 of the Municipal Code of Chicago limits the authority of the Chicago Board of Health in determining what hospitals shall be designated as type "A" in those areas where a community plan for furnishing emergency medical care is in effect under an agreement between all hospitals in said area, or to designate those hospitals as approved in areas where no community wide plan is in effect.

The purpose of the community or areawide plan for furnishing of hospital emergency medical care under an agreement between all hospitals in a given area or community was to relieve certain hospitals from providing certain levels of emergency care which they are normally required to provide. The plan was never intended to prevent a hospital from providing a higher level of emergency care or precluding the delivery of patients by ambulance to such a hospital because an area wide plan entered into on a voluntary basis was in effect, where the Chicago Board of Health found that in fact such a hospital met the criteria for designation as an "A" hospital for purposes of the community or area wide plan or to approve such a hospital for delivery of patients by ambulance in areas where no area wide or community plan is in effect.

The Chicago North Side Commission on Health Planning is without authority to usurp the authority of the Board of Health to determine which hospitals shall be designated as receiving hospitals for purposes of Chapter 103 of the Municipal Code.

It is our opinion that the suggestion of the Executive Director of the Chicago North Side Commission on Health Planning in his letter of April 5, 1973 that "The appearance of Edgewater Hospital on lists of receiving hospitals could then be seen as a violation of the City code and/or state law" is without foundation in fact or in law.

HEALTH EXAMINATIONS OF SCHOOL CHILDREN

(Commissioner of Health—A. H.—January 3, 1968)

We have your recent letter seeking an opinion as to whether an amendment to Section 27-8 of the Illinois School Code (Ill. Rev. Stat. 1967, ch. 122, par. 27-8), which was adopted at the last session of the Illinois Legislature, in any way affects the designation of the Chicago Board of Health by the Illinois Department of Public Health as the agency with responsibility to accomplish health examinations of school children.

We have examined the amendments to Section 27-8 to which you referred and find nothing within the amendments to this Section which would affect the validity of said designation.

USE OF PHOTOGRAPHS OF CHICAGO RESIDENTS FOR THE ADVANCEMENT OF PUBLIC HEALTH INFORMATION

(Commissioner of Health—P. M. S.—December 19, 1969)

In response to your request to review the release form pertaining to the use of photographs of Chicago residents for the advancement of Public Health information, enclosed please find two recommended consent forms.

It is our understanding that the majority of these photographs are pictures of people receiving services of the Board of Health. As you can understand there is a need for the exercise of sound judgment in the selection of the photographs used for publication.

Numerous of your noteworthy programs deal with such delicate areas as the treatment and detection of venereal diseases, progressive alcoholism, communicable diseases and mental illnesses. It would be unadvisable to use any patient's photograph in a situation where there could be an inherent embarrassment or where the subject of the photograph would be shown in an unfavorable light. Also there are situations where the patient is legally incapable of giving his consent due to the nature of his illness.

Where the patients can knowingly and voluntarily consent to the use of their photographs, it should be remembered that the Board of Health frequently deals

with indigent people who often do not have considerable education. Therefore, efforts should be made to avoid any criticism that they did not really know what they were consenting to or that the consent was given because of their apprehension that a refusal to do so might jeopardize their status as patients of the Board of Health.

After speaking to Mr. Vincent Saunders and looking at several of the Board of Health's publications, we know that you are cognizant of the various considerations involved.

RELEASE OF RECORDS

(Commissioner of Health—H. N. L. March 29, 1973)

This letter is in reply to your letter requesting our opinion as to whether or not the records of the Chicago Board of Health could be released for the study currently being done by Rush-Presbyterian St. Lukes Medical Center and Medicus Systems Corporation under an H.E.W. grant.

We have inspected the ordinances of the City and the State Statutes and find no prohibtion against disclosing information of this type. Accordingly, pursuant to the policy of confidentiality of the Board of Health, as long as the assurances specified in Mr. Hammerman's letter are present, regarding the confidentiality of the data to both the homes and to other agencies, we seen no reason why the Board of Health could not release these records for this study.

VETERINARIAN SERVICES FOR POLICE DEPARTMENT

(Commissioner of Health—H. N. L.—March 29, 1973)

This letter is in reply to your request that we issue an opinion as to whether the City of Chicago has the responsibility of providing veterinarian services to the animal care section of the Chicago Police Department, due to the fact that we have been informed by the Cook County Rabies Inspector that he will no longer be providing that service.

It is the opinion of this office that the langauge of Section 23p of the Rabies Control Act (Ill. Rev. Stat. 1971, ch. 8, par. 23p.) is mandatory. The duty is imposed solely on the Rabies Inspector and there is no alternative duty on the City of Chicago under the Rabies Control Act.

HEALTH CENTER JANITORIAL SERVICES

(City Comptroller—R. L. H.—January 4, 1973)

Your letter of November 28, 1972 requested our opinion as to the validity of Provident's claim for payment for janitorial services rendered to the Board of Health at the Daniel Hale Williams Neighborhood Health Center. Attached to your letter were various exhibits including the basic lease of premises, various purchase orders for janitorial services and a copy of the Daniel Hale Williams Model Cities Budget providing for four janitorial employees.

We reviewed these various attachments and upon said review we agreed with your concern inasmuch as janitorial services were supposed to be furnished in the original lease with Provident, janitorial services were then contracted for with Provident, and janitorial services were again provided for in the Daniel Hale Williams budget—all for the same premises.

We discussed this matter with Mr. Eugene Ryder of the Board of Health and the attached letter was received by way of explanation.

Upon full review of the entire matter, it is logical that "janitorial services" to be provided under a lease of space cannot include *all* janitorial services necessary for a health center since the requirements for a health center must of necessity, exceed the standard requirements for janitorial services generally contemplated.

The first letter attachment to your letter dated April 28, 1970 from the Commissioner of Health to Provident indicates that "supplemental" janitorial services will be provided by the Board of Health to insure that the health center meets the highest standard of cleanliness when, and if, it is deemed necessary to so provide.

When it was determined that these "supplemental" janitorial services were necessary, it was further determined that Provident would be the logical source of such services and the purchase requisitions then followed. An error was made, however, in the purchase requisition by the reference to "janitorial services", instead of "supplemental janitorial services", an error which can be easily explained away and corrected in the future.

The Daniel Hale Williams contract budget for operating the health center did, in fact, provide for four persons in the "janitorial service" area, but, as set forth in the attached letter from the Board of Health, only one person was employed out of these four and this person's duties were not in the janitorial service area.

It is therefore our opinion that Provident's claim for payment should be honored with the additional provision that any contract with them for janitorial services for calendar 1973 set forth in full particularity that the services are "supplemental janitorial services".

Section D. MUNICIPAL TUBERCULOSIS SANITARIUM

SCOPE OF TREATMENT—MUNICIPAL TUBERCULOSIS SANITARIUM

(General Superintendent, Municipal Tuberculosis Sanitarium—M. C. H.—January 26, 1968)

This is to acknowledge receipt of your letter to this office, in which our opinion is requested as to whether or not you are authorized by statute to treat other respiratory diseases of the chest, or the use of your Hospital as a facility for geriatrics.

Please be advised that Chapter 24, §11-29-8, provides as follows:

> "11-29-8. [Use of sanitarium—Regulations—Extension of benefits.] Every sanitarium established under this Division 29 shall be free for the benefit of the inhabitants of the city or village which established it, if they are afflicted with tuberculosis. They shall be entitled to occupancy, nursing, care, medicine and attendance according to the rules and regulations prescribed by the board of directors of the sanitarium. The sanitarium always shall be subject to such reasonable rules and regulations as the board may adopt in order to render the use of the sanitarium of the greatest benefit to the greatest number. . . .
>
> "The board may extend the privileges and use of the sanitarium and treatment to afflicted persons who reside outside of the city or village but in this state, upon such terms and conditions as the board may prescribe by its rules and regulations. . . ."

It is our opinion that the language used in the statute above quoted limits your activities to the treatment of persons afflicted with tuberculosis.

HOSPITALIZATION OF PATIENTS FROM ANOTHER COUNTY

(General Superintendent, Municipal Tuberculosis Sanitarium—F. G. S.—January 2, 1973)

Your letter of December 28, 1972 addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for attention and reply. You attach a letter from Robert F. Bettasso, M.D., Medical Director LaSalle, County Tuberculosis Clinic and request an opinion regarding hospitalization of patients from another county.

The Chicago Municipal Tuberculosis Sanitarium is established pursuant to Division 29, Chapter 24, Illinois Revised Statutes and is therefore subject to the provisions contained therein.

Section 11-29-8, Chapter 24, Ill. Rev. statutes in pertinent part provides as follows:

> "The board may extend the privileges and use of the sanitarium and treatment to afflicted persons who reside outside of the city or village upon such terms and conditions as the board may prescribe by its rules and regulations consistent with Section 11-29-8.1."

The pertinent portions of Section 11-29-8.1 provide as follows:

> "The board of directors may provide hospitalization to any person afflicted with tuberculosis regardless of residence.
>
> "A person suffering from tuberculosis who does not meet the requirements under (a)(b) or (c) of this section may be hospitalized in a tuberculosis sanitarium maintained by the Department of Public Health."

On the basis of the above provisions of the law, it is our opinion that there are two alternatives open to patients with tuberculosis in LaSalle County. 1. Hospitalization in a tuberculosis sanitarium maintained by the Illinois Department of Public Health or 2. Hospitalization at the Chicago Municipal Tuberculosis Sanitarium, if that is a policy established by the Board of Directors of the City of Chicago Municipal Tuberculosis Sanitarium.

Insofar as costs for such hospitalization at the Municipal Tuberculosis Sanitarium are concerned, these as well as the terms and conditions under which the privilege and use of the sanitarium would be granted to afflicted persons who reside outside the city would have to be established or prescribed by rules and regulations adopted by the Board of Directors of the City of Chicago Municipal Tuberculosis Sanitarium.

AUTHORITY TO COMPEL EXAMINATION FOR TUBERCULOSIS

(General Superintendent, Municipal Tuberculosis Sanitarium—F. G. S.—January 28, 1970)

Your recent letter addressed to the Corporation Counsel, requesting an interpretation of Public Act No. 76-1569, amending Chapter 24, Section 11-29-8 of the Illinois Municipal Code, and Public Act No. 76-1594, amending Chapter 24, Sections 11-29-1, 11-29-18, and 11-29-22 of the Illinois Municipal Code has been referred to the undersigned for reply.

It is our opinion that the amendment to Chapter 24, Section 11-29-8 of the Illinois Municipal Code gives the Board of the City of Chicago Municipal Tuberculosis Sanitarium power to seek out and determine from circumstances other than specific diagnosis that tuberculosis does in fact exist in an individual.

The further amendment of the same section of the Illinois Municipal Code that *"No person shall be compelled to undergo an examination or test for tuberculosis if he objects thereto on the ground that it is contrary to his religious convictions, unless there is probable cause to suspect that he is infected with tuberculosis in a communicable stage,"* must be interpreted in light of court decisions pertaining to such matters. In *People* v. *Robertson,* 302 Ill. 422, at page 432, the court stated:

> "While the powers given to the health authorities are broad and far-reaching, they are not without their limitations. As we have said, while the Courts will not pass upon the wisdom of the means adopted to restrict and suppress the spread of contagious and infectious diseases, they will interfere if the regulations are arbitrary and unreasonable."

In the same case at page 432, the Court said:

> "A person cannot be quarantined upon mere suspicion that he may have a contagious and infectious disease, but the health authorities must have reliable information on which they have reasonable ground to believe that the public health will be endangered by permitting that person to be at large."

Applying the Court's reasoning to an interpretation of the amendment cited above, it is our opinion that where a person objects to undergoing an examination or test for tuberculosis on the ground that it is contrary to his religious convictions, he cannot be compelled to undergo such examination or test unless the Board has reliable information on which reasonable ground exists to believe that public health will be endangered by permitting that person to be at large without examining him or testing him to determine if he is infected with tuberculosis in a communicable stage.

With respect to the amendments which extend the privileges and use of the sanitarium "to the inhabitants of such city or village *who are afflicted with chronic pulmonary diseases other than tuberculosis . . .*", it is our opinion that the section and amendments thereto relate only to cities and villages "which have a population of less than 500,000 inhabitants", and would therefore not apply to the operation of the City of Chicago Municipal Tuberculosis Sanitarium.

It is our opinion that Public Act No. 76-1594, amending Chapter 24, Sections 11-29-1, 11-29-17, 11-29-18, and 11-29-22, does not apply to the City of Chicago Municipal Tuberculosis Sanitarium, since the deleted provisions, making the stated tax rate limits subject to the General Revenue Law, applied only to cities and villages of less than 50,000.

PENALTY FOR PERSONS WITH COMMUNICABLE DISEASE WHO REFUSE ISOLATION

(Commissioner of Health—A. H.—October 16, 1967)

You have asked for an opinion as to the legality of a statement regarding "The Law, etc.," which appears on a form enclosed with your letter, which you intend to issue to patients found to have a communicable case of tuberculosis.

The statement of "The Law, etc.," incorporated in your form, appears to have been taken from Paragraph 24 of the Illinois Public Health Code (Ill. Rev. Stat. 1965, ch. 111½, par. 24). The statement is substantially correct, although one would be required to trace several additional provisions of law as well as sundry rules and regulations in order to support said statement.

It should be noted that Chapter 9 of the Municipal Code of Chicago, Sections 9-5, 9-16 and 9-26, may also be cited for a similar proposition. The practical effect of citing Municipal Code provisions, rather than State law, involves the choice of enforcement by the Corporation Counsel's Office in the case of the former, or by the State's Attorney's Office in the latter instance.

We note that the reverse side of the form you have submitted is blank; perhaps actual quotations from the applicable law or rules could have an equally, if not more, desirable effect upon the reader.

DETERMINATION OF VACATION TIME ALLOWABLE

(General Superintendent, Muncipal Tuberculosis Sanitarium—A. H.—October 20, 1967)

Your recent request for an opinion with respect to the appropriate determination of the vacation time allowable for the above-named employee, addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, has been referred to the undersigned for consideration and response.

You have attached to your letter a list of City of Chicago departments which have employed Mr. Krich, starting in the year 1933, showing each department for which he worked and his starting and termination dates, as well as layoff periods. You ask whether Mr. Krich would be entitled to a 3-week or 4-week vacation under the facts set forth.

The Regulations Governing the Administration of Compensation for Classified Positions, as contained in the Compensation Plan for City Employees Established for the Year of 1967 (J. Couns. Proceed., December 19, 1966, pp. 8264-68) sets forth the pertinent provisions governing the situation to which you have referred. Paragraph B(7), relating to Continuity of Service contains, in part, the following language:

> "Absence from the City service on leave without pay for periods in excess of 30 days, all suspensions, time after layoff for more than 30 days and prior to reinstatement, and all absences without leave shall be deducted in computing total continuous service. All separations, discharges and resignations not followed by reinstatement within one year shall interrupt continuous service and shall result in the loss of all prior service credit."

The legislative intent appearing in the above-quoted language of the Regulations appears to be that absence of City service due to layoffs, and absence from City service due to separations, discharges and resignations, are to have distinctly different consequences, the former bearing an element of involuntary separation without fault and the latter containing either the element of fault on the part of the employee or voluntary separation. As we construe the language, a City employee who has been laid off for a period in excess of a year and is later reinstated, while not entitled to credit for employment during the layoff, is not subject to the requirement of reinstatement within one year to preclude the loss of all prior service credit.

Under the foregoing construction, and in consideration of the work schedule you have submitted, it would appear that Mr. Krich has served in excess of 20 years of "continuous" service and, therefore, under Section G(2)(a) of the Regulations, he would be entitled to a 4-week vacation at this time.

CONSENT FORMS FOR SURGICAL AND MEDICAL PROCEDURES

(General Superintendent, Muncipal Tuberculosis Sanitarium—F. G. S.—April 2, 1971)

This will acknowledge receipt of your recent letter addressed to Richard L. Curry, Corporation Counsel, and the present consent forms for surgical and medical procedures now used by you.

We have made an analysis of the forms you now use and of the consent form suggested by your Dr. J. Robert Thompson, Chief Pathologist to be used only where blood transfusions are indicated. It is our opinion that the form proposed by Dr. Thompson is more specific than the other two forms you use, not only with respect to what it purports to consent to and authorize, but also in respect to holding harmless any and all parties involved in connection with the administration of blood. In our opinion the form is useful in that it is detailed and specific in its terms.

Your question as to whether the execution of such a form will protect you against suits for malpractice must be answered in the negative. It is our opinion that the execution of this consent form would protect you from a suit where under normal accepted rules and proper procedures blood was administered and the patient contracted hepatitis.

Malpractice is defined as:

> "The treatment of a case by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; hence any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties."

Therefore, notwithstanding the "Consent To Administer Transfusions" form, or for that matter any of your consent forms, a suit for malpractice could be instituted. The successful prosecution of such a case would depend upon the plaintiff's ability to prove the essentials necessary to support a charge of malpractice as reflected in the definition cited above.

It is our opinion that the "Consent to Administer Transfusion" form is a useful form and would offer protection against a suit for damages where the patient contracted hepatitis as a result of the administration of blood in any form under accepted rules of procedure and with the skill required under the circumstances.

MALPRACTICE INSURANCE FOR STAFF PHYSICIANS AT MUNICIPAL TUBERCULOSIS SANITARIUM

(General Superintendent, Muncipal Tuberculosis Sanitarium—M. C. H.—November 25, 1968)

This is to acknowledge the receipt of your correspondence addressed to this office, in which our opinion is requested as to whether or not the Staff Doctors should be required to carry medical malpractice liability insurance.

The requirement that physicians secure malpractice insurance is one of employment policy, in our opinion, rather than one of law. In arriving at that policy, it may be helpful to note the provisions contained in Section 6-106 of the Local Governmental and Governmental Employees Tort Immunity Act (Ill. Rev. Stat. 1967, ch. 85, par. 6-106), which provides as follows:

> "§ 6-106. (a) Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicated with mental or physical illness or addiction or from failing to prescribe for mental or physical illness or addiction.
>
> "(b) Neither a local public entity nor a public employee acting within the scope of his employment is liable for administering with due care the treatment prescribed for mental or physical illness or addiction.
>
> "(c) Nothing in this section exonerates a public employee who has undertaken to prescribe for mental or physical illness or addiction from liability for injury proximately caused by his negligence or by his wrongful act in so prescribing or exonerates a local public entity whose employee, while acting in the scope of his employment, so causes such an injury. * * *"

It should be further noted that the above provisions have not as yet been tested in the reviewing courts of Illinois.

MANAGEMENT OF PREGNANT EMPLOYEES

(General Superintendent, Muncipal Tuberculosis Sanitarium—A. H.—February 10, 1969)

We have your correspondence concerning the management of employees of the Municipal Tuberculosis Sanitarium who have become pregnant. You set forth questions relating to the procedures to be followed with respect to the continuation of employment in view of this physical conditions of said employees, also setting forth excerpts from an Illinois Department of Public Health pamphlet respecting policies for pregnant women and ask when you should terminate their employment, whether they should sign waivers of responsibility and what you should do to protect the Sanitarium with respect to financial responsibility in case of injury.

It is respectfully submitted that these are questions of employment policy and health measures, rather than legal questions regarding protection of the Sanitarium.

We note, in passing, that under the Illinois Employment Code, a woman is deemed unable and unavailable for work with respect to the thirteen weeks which immediately precede the anticipated date of childbirth and the four weeks which immediately follows such date, in terms of unemployment compensation provisions (Ill. Rev. Stat. 1967, Ch. 48, Par. 420 C.4.), which you may wish to consider in arriving at the policy to be formulated by our office. You may also wish to consult with City health authorities in establishing guidelines for employment of pregnant women.

USE OF AN IDENTIFICATION BADGE

(General Superintendent, Muncipal Tuberculosis Sanitarium—F. G. S.—January 8, 1971)

Your letter of November 19, 1970, addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for attention and reply. In your letter you request an opinion as to whether the guards at the Municipal Tuberculosis Sanitarium could use an emblem in the form of a star, sketches of which you attached, as an identification badge, instead of the present emblem they are wearing.

Chapter 11, Section 11-47 of the Municipal Code of Chicago provides, in part, as follows:

"11-47 . . .

"No person shall counterfeit or imitate, or cause to be counterfeited or imitated, any badge, sign, signal or device adopted by the Department of Police. Nor shall any person use or wear any badge, sign, signal or device adopted or used by said department or any similar in appearance, without authority so to do from the Board.

It is our opinion that the stars submitted in your sketches are similar in appearance to the badge adopted by the Department of Police of the City of Chicago and therefore may not be worn without the authority so to do from the Police Board.

The wearing of such a badge without specific authority from the Police Board would be in violation of Section 11-47, Chapter 11 of the Municipal Code of Chicago.

If you wish to pursue the matter further, it is suggested that a letter of request for authority to use a star similar to the ones in your attached sketches be directed to the Police Board of the City of Chicago. The sketches and photo you enclosed are returned herewith.

CHARGES FOR PATIENTS AT MUNICIPAL TUBERCULOSIS SANITARIUM

(Alderman, 46th Ward—F. G. S.—January 21, 1972)

Your letter of November 18, 1971, addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for attention and reply.

In your letter you request an opinion as to whether the Municipal Tuberculosis Sanitarium may charge patients for care at the Municipal Tuberculosis Sanitarium, issue bills or statements for said charges and collect for said charges from third party payers and from Public Assistance.

In your letter you cite Chapter 23, Section 1701 et. seq. (Ill. Rev. Stats. 1969), as the section cited by some as prohibiting MTS from issuing bills to patients at a specific per day charge.

Chapter 23, Section 1701 et. seq. (Ill. Rev. Stats. 1969), does not apply to MTS, it is an Act that provides for the creation and management of tuberculosis sanitarium districts in any area of contiguous territory lying wholly within one county but entirely outside the corporate limits of any city or village which has adopted Division 29 of Article 11 of the Illinois Municipal Code, Chapter 24 (Ill. Rev. Stats. 1969).

The pertinent provisions of the Illinois Statutes which apply to and govern the establishment and maintenance of MTS are contained in Chapter 24, Article 11, Division 29, (Ill. Rev. Stats. 1969).

Chapter 24, Section 11-29-8 (Ill. Rev. Stats. 1969), provides in pertinent part as follows:

> "11-29-8. Use of sanitarium—Regulations—Extension of Benefits. Every sanitarium board established under this Act shall provide sanitarium care and clinical and follow-up services free for the benefit of the inhabitants of the City or Village which established it, if they are affilicted with tuberculosis. . . ."

The Municipal Tuberculosis Sanitarium is established pursuant to Chapter 24, Article 11, Division 29 (Ill. Rev. Stats. 1969), and therefore must comply with the provisions governing its establishment and management. Chapter 24, Article 11, Section 11-29-8 (Ill. Rev. Stats. 1969), specifically provides that services to inhabitants of the city served by MTS be provided free.

The City of Chicago or MTS is without power as presently constituted to charge patients and third party payers for services rendered.

In order to provide for a method of charging for patient scare, it would be necessary for the General Assembily to amend Chapter 24, Article 11, Division 29 (Ill. Rev. Stats. 1969), to permit MTS to charge patients and third party payers for services rendered, or for the present MTS to discontinue its operations pursuant to Chapter 24, Article 11, Division 29, Sections 11-29-13, 11-29-14, 11-29-15, and 11-29-16, and for the corporate authority, i.e., City Council to establish an MTS pursuant to its home rule powers.

RULES GOVERNING MONIES OF PATIENTS IN MUNICIPAL TUBERCULOSIS SANITARIUM

(General Superintendent, Muncipal Tuberculosis Sanitarium—M. C. H.—October 27, 1967)

This is to acknowledge the receipt of your letter in which you inquire whether or not you are authorized to transfer a patient's money to another agency.

Please be advised that at a conference in your office, at which were present: Dr. Lichtenstein, the Municipal Tuberculosis Sanitarium Auditor, Miss Epstein, Social Worker, Miss O'Malley of the Department of Public Aid, and myself, it was agreed that any patient who is physically or mentally incompetent, with assets upto $800 may be turned over to the Conservator Unit of the Cook County Department of Public Aid upon receipt from the person in charge of said Unit, provided said patient is quiescent noninfectious but needs nursing home care.

At a meeting in your office on Friday, October 20, at which were present the Public Guardian, Margaret B. Terrell, her attorney, Dr. Lichtenstein and Miss Epstein, the Social Worker, we agreed that in the case of any patient in your Institution with assets exceeding $800, whose tuberculosis infection has been arrested, who is physically or mentally incompetent, and is in need of nursing home care, a notice should be given in writing to the Public Guardian requesting that a petition be presented to the Probate Court for the appointment of a conservator to take charge of such patient.

Any assets over and above $800, belonging to any patient in your Institution must be turned over to the conservator if and when Letters of Administration are issued by the court to take charge of such patient; provided, however, that the patient has no family able to give the care he needs. Patients who are senile, not considered committable, yet not sufficiently competent to handle their own money, should likewise be treated accordingly.

DISCHARGE OF RETICENT PATIENT

(General Superintendent, Muncipal Tuberculosis Sanitarium—M. C. H.—August 23, 1967)

This is to acknowledge the receipt of your letter to this office in which you state that the above mentioned patient has been recommended for Quiescent Discharge.

You further state that the patient needs nursing home care, but refuses to leave the institution. You now seek our advise how to solve this problem without any embarrassment to your institution.

Please be advised that I have turned over your letter to the Public Guardian of the State of Illinois who will petition the court for the appointment of a Conservator to take charge of the subject matter.

DISPOSITION OF PERSONAL PROPERTY OF MUNICIPAL TUBERCULOSIS SANITARIUM PATIENTS DYING INTESTATE

(Public Administrator, Cook County—F. G. S.—July 10, 1972)

We are attempting to resolve the problem of disposition of personal effects of patients at the Municipal Tuberculosis Sanitarium who have died intestate and having no living relatives in the City of Chicago.

On the basis of correspondence and a telephone conversation with Mr. John L. Sullivan, Jr., Administrative Assistant to the Public Administrator we are advised that the Public Administrator's authority extends only to those cases where "we are appointed Administrator." Since the basis for opening an estate is a minimum of $1,000. in the decedent's estate, only in two such cases in the attached list did the Public Administrator take possession of the personal effects of the descedent. In the remaining 29 cases in the attached list, we are left holding personal property with no instruction as to disposition by the Public Administrator, who pursuant to Section 166, Chapter 3 (Ill. Rev. Stats. 1971) is charged with the responsibility to "take such measures as he deems proper to protect and secure the estate from waste, loss, or embezzlement . . ." We realize full well that the size of the estate in the cases listed on the attached sheet is minimal and that no estate will be opened in such cases.

If it is the policy if the Public Administrator not to take possession of personal effects, (other than cash), in estates where the cash value is less than $1,000, and where no letters if administration will be sought, we ask that you issue a letter of direction as to the procedure to be followed by the Municipal Tuberculosis Sanitarium in the disposition of said personal effects of decedents who have died intestate and where no living relative can be located to whom said personal property can be delivered.

DISPOSAL OF "ENTERTAINMENT TRUST" FUNDS

(General Superintendent, Muncipal Tuberculosis Sanitarium—M. J. P.—May 2, 1973)

Your letter of March 22, 1973, addressed to the Honorable Richard L. Curry, Corporation Counsel of the City of Chicago, requesting an opinion as to the proper use of the $16,663.84 received by the Municipal Tuberculosis Sanitarium, in accordance with the attached Court Order, has been referred to the undersigned for reply.

The Order requires that the income from bequests be used for "the furnishing of entertainment to and the improving of the spiritual, intellectual or physical conditions of the inmates of the Municipal Tuberculosis Sanitarium of Chicago, Illinois.

Under this trust, the Municipal Tuberculosis Sanitarium of Chicago is the trustee for the benefit of the inmates of said Sanitarium, the beneficiaries of the trust.

In the trust situation, the trustee has an obligation to make the property productive. In the instant case, the Sanitarium must invest the money and then distribute the income for the benefit of the Sanitarium's inmates.

Where the creator of the trust has given no specific directions concerning investments, as in the instant case, the rule in general terms is, that a trustee must, in the investment of the trust funds act with good faith and sound discretion. The question of lawfulness and the fitness of the investment is to be judged as of the time when it was made, and not by subsequent facts which could not then have been anticipated.

The trustee is required to exercise reasonable care and skill and to act prudently in the performance of his functions.

The element of prudence is frequently emphasized by stating that the test is how a prudent trustee would act in administering the property of others or how he would act in conserving the property. A trustee, possessing greater than ordinary skill and more than ordinary facilities is under a duty to exercise the skill and to utilize the facilities at his disposal.

The Sanitarium, as trustee, is required to keep records and to render accounts to those interested in the trust.

In conclusion, the Municipal Tuberculosis Sanitarium of Chicago has the duty as trustee, to manage and invest the money for the exclusive benefit of the inmates of said Sanitarium. The Sanitarium must invest the money and then, use the income for the furnishing of entertainment to, and the improving of the spiritual, intellectual or physical conditions of the inmates.

SALE OF LIQUOR ON PREMISES OF SANITARIUM

(General Superintendent, Muncipal Tuberculosis Sanitarium—A. H.—April 17, 1968)

We have your letter requesting an opinion of this office with respect to the activities of an employee suspected of selling liquor to patients by permitting them to open the trunk of her auto parked on the grounds of the Sanitarium and extract whiskey therefrom, presumably upon receipt of payment. You ask whether the Illinois Liquor Control Act can be revised so that Paragraph 130 may include transporting or possession of alcoholic liquors on the grounds of the Sanitarium.

Although Paragraph 130 (Ill. Rev. Stat. 1967, ch. 43) to which you refer, (which explicity prohibits the sale or delivery of alcoholic liquors in or to any "building" belonging to or under the control of the State or any political subdivision thereof) would have application to the facts described in your letter, said provision by no means exhausts the law as applies to said situation. For example, Paragraph 127 of the Act provides that no license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of schools or hospitals, among other places, which has been construed as meaning 100 feet of the prohibited premises, rather than the prohibited building (See *Smith* v. *Ballas,* 335 Ill. App. 413). When considered together with Paragraph 96 of the Act, which prohibits, among other things, the sale, transport, delivery, furnishing or possession except as provided by the Act; Paragraph 110 of the Act, which delegates jurisdiction over retail selling to municipalities; and Section 147-2 of the Municipal Code of Chicago, which prohibits sales without first having obtained a license in the City of Chicago, it becomes quite clear that the activity of your employee, as described in your letter, is prohibited by existing law and must be proscribed.

Evidence of such a sale or sales should be secured and legal action, either through the Courts or possible Civil Service removal, or both, are suggested courses of action which may be taken with respect to the activities of which you have advised.

Section E. OTHER DEPARTMENTS AND OFFICERS

RENAMING CIVIC CENTER PLAZA

(Committee on Cultural and Economic Development A. H.—March 12, 1968)

Your recent communication addressed to Raymond F. Simon, Corporation Counsel, with respect to two proposed ordinances, the first of which is apparently concerned with renaming the Civic Center Plaza to Du Sable Plaza and the second of which is concerned with a proposed erection of a mural on a triangular piece of land in the 29th Ward, has been referred to the undersigned for consideration and response.

It must first be noted that the Civic Center Plaza is not the property of the City of Chicago, but rather is owned by the Public Building Commission of the City of Chicago, a body corporate and politic separate and apart from the City

of Chicago (Ill. Rev. Stat. 1967, ch. 85, par. 1044). Any request to name or rename property so owned should be referred to said Public Building Commission.

Furthermore, the City Council has recently adopted a comprehensive amendatory ordinance creating the Commission on Chicago Historical and Architectural Landmarks, under whose initial jurisdiction the suggested activities would appear fall in any event (see *e.g.*, J. Couns. Proceed., 1968, pp. 2123-26).

Under the foregoing circumstances, it is our opinion that your Committee does not have jurisdiction over the proposed ordinances at this time.

DUTIES AND POWERS OF OFFICERS OF DEPARTMENT OF CONSUMER SALES, WEIGHTS, & MEASURES

(Deputy Commissioner of Consumer Sales, Weights, and Measures—A. H.—October 20, 1967)

Your recent request for an opinion as to whether deputies of your office have the power to arrest on view for violations of Sections 100-29 and 100-29.1, Chapter 100, of the Municipal Code of Chicago, has been referred to the undersigned for consideration and response.

Chapter 16, Section 16-5 of the Municipal Code of Chicago contains the following provisions:

> "The Commissioner of Consumer Sales, Weights and Measures, his deputies, assistants and employees are hereby given police powers and shall have the power to examine all documents of offer, acceptance and sale and such other documents related to said sale or advertisement, and to weigh or measure and inspect packages or commodities kept for sale or sold in process of delivery in order to determine whether the laws in relation to consumer sales, weights and measures have been observed and in the performance of their official duties may enter any premises or stop any vendor or driver of any vehicle and require him to go to some convenient place which the Commissioner of Consumer Sales, Weights and Measures, or any of his deputies, assistants and employees, may specify for the purpose of making proper tests. The Commissioner of Consumer Sales, Weights and Measures, his deputies, assistants and employees shall have the powers of regular policemen to arrest any person violating the provisions of this code in relation to consumer sales, weights and measures and to take as evidence any false or unsealed weight, measure, scale, meter or other weighing or measuring device or any package or commodity sold of kept for sale in violation of the provisions of this code in relation to consumer sales, weights and measures."

In view of the foregoing language, it is our opinion that the Commissioner of Consumer Sales, Weights and Measures and his deputies have the powers of arrest on view for violations relating to Municipal Code provisions involving consumer sales, weights and measures including Section 100-29 and 100-29.1, where, in the best judgment of the Commissioner or his deputies, an on view arrest is both necessary and appropriate.

"CITY SEALERS" AUTHORITY OVER WEIGHTS AND MEASURES ACT

(Commissioner, Department of Consumer Sales, Weights and Measures—H. L. R.—May 28, 1968)

Your letter to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response. In your letter you ask whether Chapter 147, paragraph 129 of the Illinois Revised Statutes is enforceable by yourself as well as by "City Sealers".

For purposes of enforcement of the act entitled "Weights and Measures", (Ill. Rev. Stat. 1967, ch. 147) you serve as the city sealer and those under you as deputy sealers. We have enclosed a copy of Chapter 16, Section 16-4 of the Municipal Code of Chicago which details the duties and powers of the Department of Consumer Sales, Weights and Measures. Among those duties and powers are the functions of sealing all weights, measures, scales, and measuring devices as well as the authority to investigate all complaints related to the violation of law governing sales and advertising.

Chapter 147, paragraph 119 of the Illinois Revised Statutes gives the city sealer and deputy sealers certain powers also possessed by the State Director of Agriculture. Among these powers is the enforcement of paragraph 129 of Chapter 147 which relates to any commodity advertised for sale by weight, measure, or count. Because you serve as city sealer, you too have the power to enforce paragraph 129.

In your letter, you recite two examples which you state are, in your opinion, a violation of paragraph 129. In your first example, you set up the common gas station practice of advertising by means of a driveway sign "gas at 31.9¢ per gallon, plus *sales* tax", but the actual price on the gas pump is 33.9¢ with the tax included. This does not appear to be a violation of the Illinois Revised Statutes because the sign clearly states the price and that sales tax is additional. There is no requirement that sales tax be figured into an advertised price.

Your second example suggests a possible violation of paragraph 129 in the advertisement which states "gas as low as 34.9¢ per gallon, plus *sales* tax", with the actual pump price of 42.4¢ per gallon. The actual sales tax cannot raise the price at which the gas can be purchased to 42.4¢. If there are no signs indicating a possible discount or other arrangement which would lower the price to 34.9¢ plus sales tax, and the 34.9¢ price cannot be obtained, a misrepresentation may have taken place in violation of paragraph 129.

CARRYING OF WEAPONS BY CORRECTIONAL OFFICERS

(Superintendent House of Correction—M. E. A.—June 5, 1968)

Reference is made to your letter of May 15, 1968 in which you request our opinion as to (a) whether your Correctional Officers are exempt from the State law pertaining to carrying weapons; and (b) whether you acted correctly placing these Correctional Officers on 24-hour official duty.

Your Correctional Officers are exempt from both the State and City sanctions against carrying firearms only while in the performance of their official duty. Ill. Rev. Stat. 1967 (ch. 38, § 24-2 (a) (2)); Section 11.2-1 (2) of the Municipal Code of the City of Chicago.

Whether or not you acted correctly in placing your Correctional Officers on 24-hour official duty is primarily an administrative policy decision. However, if there is no way of justifying members of your Correctional Officers' staff being on 24-hour duty, your decision placing them on such status would appear to be erroneous. This would be especially true if the duties of these officers are performed solely at the House of Correction on less than a 24-hour a day basis.

WORK RELEASE FROM JAIL

(Director, Circuit Court of Cook County—M.E.A.—March 31, 1970)

Reference is made to your letter of March 10, 1970 to Richard L. Curry, Corporation Counsel of the City of Chicago in which you ask that we "reflect on the possibility of an ordinance similar to the State Section [Ill. Rev. Stat. 1969, Ch. 75 §35] covering [work] release from jail pending payment of fine."

The aforementioned section 35 reads as follows:

"In the case of any person committed to the county jail, house of correction or workhouse, for any crime or for nonsupport of any member of his family, or for nonpayment of a fine, or for contempt of court, the court may, in its order of commitment provide that such person may leave the county jail, house of correction or workhouse during necessary and reasonable hours for any of the following purposes:

(a) Seeking employment;

(b) Working at his employment;

(c) Conducting his own business or other self-employed occupation including, in the case of a woman, housekeeping and attending the need of her family;

(d) Attendance at an educational institution, or

(e) Medical treatment.

"Unless such work release order is expressly granted by the court, the prisoner is sentenced to ordinary confinement. The prisoner may petition the court for such work release at the time of sentence or thereafter, and in the discretion of the court may renew his petition. The court may revoke the work release order at any time with or without notice."

Section 35 became effective on January 1, 1969 (see p. 391 of Vol. 2 of the Illinois Revised Statutes).

Section 35 provides that "in the case of any person committed to the County Jail [or] House of Correction . . . for non-payment of a fine" the "work release" program may be provided for according to law. Therefore, section 35 fully covers persons "working out" fines for the violation of City ordinances. For that reason, it is not necessary for the City of Chicago to enact an ordinance similar to section 35.

"LOST" AND "MISLAID" PROPERTY

(Superintendent, House of Correction—F. V. K.—February 26, 1969)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, has been referred to the undersigned for response.

You refer to a ring which was found by one of your employees in the men's washroom on the first floor in the new Administration Building. Reference was made to the fact that this bathroom was for the use of the general public, but no indication was given as to the location of the ring in the bathroom when found; however, a telephone conversation disclosed that the ring was found on a washstand near one of the sinks. You request an opinion as to what to do with the property which has been held in the cashier's office safe since February of 1968, because the employee who found the ring wishes it returned to himself claiming the property as a "finder."

The issue presented by the facts in your letter turns upon the old common law distinction between "lost" and "misplaced" property. Illinois courts have not passed upon the aforesaid distinctions; however, the same may be found in encyclopedic law and case law from other jurisdictions.

For the property to be considered lost, its owner must have parted with it involuntarily, either through negligence, carelessness or inadvertence. The owner must at no time be aware of the whereabouts of the property. *Jackson* v. *Steinberg*, 186 Or. 129, 200 p. 24 376 (1948); see also 1 Am.Jur.2d *Abandoned, Lost and Unclaimed Property*. Sec. 2 (1962).

When property is "voluntarily laid down" and is subsequently forgotten it is not lost but misplaced. *Foster* v. *Fidelity Safe Deposit Co.*, 264 Mo. 89, 174

S.W. 376 (1915). Such property is considered constructively to be in the possession of its owner. Misplaced property is presumed to be left in the custody of the owner or occupier of the premises where the property is found. The right to possession of the property as to all except the true owner is in the owner or occupier of the premises. The finder has no right to the property and cannot recover it from the owner or occupier of the premises even if the true owner never claims the property or cannot be found, *Silcott* v. *Louisville Const. Co.*, 205 Ky. 234, 265 S.W. 612 (1924); *Flax* v. *Monticello Realty Co.*, 185 Va. 474, 39 S.E. 2d 308 (1946); see also 1 Am.Jur. 2d *Abandoned, Lost and Unclaimed Property*, Sec. 23 (1962).

The ring in the instant case was found on a washstand in the bathroom. A washstand is a logical place for some one to "voluntarily lay down" the ring when using the washroom facilities. Thus, the ring, in all probability, was voluntarily removed, placed on the washstand and subsequently forgotten, thereby making the property mislaid rather than lost.

Since the ring's owner has not come forward to claim the ring, under Section 1 of an Act relating to the custody and disposition of certain property (Ill. Rev. Stat. 1967, Chap. 141, Par. 141) the disposition and sale of such property may be made by law enforcement agencies. Thus, the ring should be turned over to the Police Department which will dispose of it in accordance with the Statute.

HOUSE OF CORRECTION—SOUTH BOUNDARY

(Superintendent, House of Correction—S. R. D.—February 13, 1969)

We acknowledge receipt of your recent communication requesting that we search the records to determine the south boundary of the House of Correction. You also ask that we determine whether the police auto pound, 3000 S. California Avenue, is within the boundaries of the House of Correction. You say that it is important to determine the south boundary because of pending state legislation for the consolidation of the House of Correction and the County Jail.

Section 24-1 of the Municipal Code of Chicago, which establishes the House of Correction and fixes the boundaries thereof, provides, in part, as follows:

> "The buildings and inclosures erected and now standing, or that may hereafter be erected on that part of the east one-half of the southwest one-quarter (except the north 427.8 feet thereof and except the east thirty-three feet and the west thirty-three feet thereof) of section twenty-five, township thirty-nine north, range thirteen, east of the third principal meridian, lying north of the west fork of the south branch of the Chicago river, being between west 26th street and the west fork of the south branch of the Chicago river, situated and lying within the city, are constituted and established a house of correction for the said city."

In a conference you stated that apparently "the west fork of the south branch of the Chicago River", which is designated as the south boundary of the House of Correction, is no longer in existence and, apparently, has been filled in. At the conference, I delivered to you two copies of surveys of the House of Correction dated December 11, 1967, and February 7, 1928. I also delivered a survey of the land lying south of the south boundary of the House of Correction and north of 31st Street, dated February 20, 1913. All of these surveys show the west fork of the south branch of the Chicago River as the south boundary of the House of Correction.

I also delivered to you a plat of the area bounded by 26th Street, California Boulevard, 31st Street, and Sacramento Avenue, showing the buildings and improvements thereon. From this plat, it is apparent that the auto pound located at 3000 S. California Avenue, is south of the south boundary of the House of Correction.

We are of the opinion that, legally, the south boundary of the House of Correction is the west fork of the south branch of the Chicago River. If this boundary is now filled in, and if there is a consolidation of the House of Correction and the County Jail whereby the House of Correction will be conveyed to the County of Cook, it might be advisable to determine a new south boundary for the House of Correction.

OUTSIDE EMPLOYMENT OF HOUSE OF CORRECTION EMPLOYEES

(Chairman, Board of Inspectors, House of Correction—M. C. H.—January 16, 1968)

This is to acknowledge the receipt of your letter dated December 27, 1967 in which our opinion is requested as to whether or not the Board of Inspectors of the House of Correction could initiate a policy to limit outside employment by a full time person on their staff to twenty hours. Our answer to this question is in the affirmative.

Section 25-57 of the Municipal Code of Chicago, provides:

"The head of each department, board or other agency of the City government shall prescribe such rules and regulations for the governance of his department, board or other agency as he shall deem necessary and proper.

"He shall furnish a copy of said rules and regulations to all subordinate officers and employees in his department, board or other agency and all said officers and employees shall be subject to such rules and regulations so prescribed and to the provisions of this code. * * *"

In view of the above, it is our opinion that the discretion to limit outside employment of the full time employee of the House of Correction to twenty hours, is lodged with the Board of Inspectors.

AUTHORITY TO EXECUTE FORMS REQUIRED BY HUD

(Commissioner, Department of Development and Planning—E. L. N.—January 20, 1969)

Your memorandum was received in this office December 26th requesting an Opinion as to whether or not the Commissioner of the Department of Development and Planning had the authority to execute the necessary requisition forms and reports for submission to the Federal Government.

The City Council of the City of Chicago adopted an Ordinance on September 19, 1966 which provided in Section 3, as follows:

"That the Commissioner of Development and Planning is hereby authorized and directed to execute and file such application, to execute such contract or contracts as may be necessary for the grant applied for, to provide such information and furnish such documents as may be required by the Department of Housing and Urban Development, and to act as the authorized representative of the Applicant in the accomplishment of the Neighborhood Facilities Propect."

Subsequently, the City Council of the City of Chicago amended said Ordinance on April 7, 1968. Said Ordinance was amended as follows:

"That Section 3 of the ordinance adopted on the 19th day of September, 1966 be amended to provide that the Mayor be and he is hereby authorized and directed to execute, and the City Clerk to attest a Neighborhood Facilities Grant Contract between the United States of America Department of Hous-

ing and Urban Development and the City of Chicago, Project No. Ill. 5-N, Contract Number Ill. N-5(G);"

"That in all other respects the ordinance adopted on September 19, 1966 as set forth in the Journal of the Proceedings of the City Council of the City of Chicago, at Pages 7237 and 7238 and be and it is hereby ratified and reaffirmed and declared to be in full force and effect with respect to all provisions except as amended herein."

In view of the fact that the Amendment to the ordinance merely provided for the execution of the contract by the Mayor and specifically stated that in all other respects the terms and conditions of the previous ordinance were ratified and reaffirmed, it is the opinion of this office that the Commissioner of the Department of Development and Planning has the authority to execute the necessary requisition forms and reports for submission to the Federal Government.

GAUTREAUX v. CITY OF CHICAGO

(Chief Judge, United States Court of Appeals—W. R. Q.—January 17, 1973)

Recently Mr. Alexander Polikoff forwarded to you a copy of the recent opinion of the Court of Appeals for the Sixth Circuit in *Bradley* v. *Milliken*; we, of course, concur in the placing of that opinion before this Court.

However, because Mr. Polikoff called to the Court's attention a specific portion of that opinion, we are impelled to briefly respond. While the City has already distinguished all the school cases at page 10 of its principal brief, we should also like to direct the Court's attention to the following passage, at page 55 of the *Bradley* opinion, in which the Sixth Circuit, quoting the District Court, notes that:

> "In seeking for solutions to the problem of school segregation other federal courts have not 'treated as immune from intervention the *administrative structure* of a state's educational system, to the extent that it affects the capacity to desegregate. Geographically or administratively independent units have been compelled to merge or to initiate or continue co-operative operation as a single system for school desegregation purposes.' [Citing *Bradley* v. *Richmond,* District Court Opinion; emphasis supplied]"

AIR POLLUTION FINES

(Commissioner, Department of Environmental Control—B. H. G.—February 27, 1970)

Your recent letter addressed to Richard L. Curry, Acting Corporation Counsel of the City of Chicago, requesting a legal opinion with respect to whether a maximum fine of $10,000 would be legal in the State of Illinois for air pollution fines, has been referred to the undersigned for consideration and response.

You have noted that our system of fines in the Chicago Air Pollution Control Ordinance have been the subject of review by your department and that it appears desirable to raise the maximum fine permissible, perhaps to the figure of $10,000 at the national level; as proposed by President Nixon. No such fine has as yet been enacted into Federal law as far as we have been able to ascertain.

We must first note that the Illinois Air Pollution Control Board presently has the power to prosecute air pollution violators and seek a penalty ". . . not to exceed the sum of $5,000 for said violation and an additional penalty of not to exceed $200 for each day during which violation continues, . . ." as well as possible incarceration for such violation (Ill. Rev. Stat. 1969, ch. 111½, par.

240.15(a)). Legal action, however, may be instituted only by the Attorney General of the State of Illinois (Ill. Rev. Stat. 1969, ch. 111½, par. 240.15 (c)). No provision is found in the Illinois Air Pollution Control Act which would empower a municipality to impose fines of a similar magnitude.

As you know, municipalities are creatures of statute and have only those powers which have been delegated to them by the legislature. See *e.g., Ives* v. *City of Chicago,* 30 Ill. 2d 582. We must look, then to the Municipal Code of Illinois which governs the powers delegated to the cities and villages of this state (Ill. Rev. Stat. 1969, ch. 24). Section 1-2-1 of the Municipal Code of Illinois delegates to the municipal authorities of each municipality the power to impose such fines or penalties as be deemed proper, propvided that "no fine or penalty, . . . shall exceed $500 and no imprisonment authorized in Section 1-2-9 for failure to pay such fine, penalty or cost shall exceed 6 months for one offense."

It is our opinion, therefore, that until state legislation is enacted which would delegate to municipalities the authority to impose higher fines generally, or to impose higher fines in the specific field of air pollution control, the City of Chicago and its Department of Air Pollution Control are limited to the terms of Section 1-2-1 of the Illinois Municipal Code, aforesaid.

AIR QUALITY ACT OF 1967

(Commissioner, Department of Environmental Control—A. H.— March 24, 1970)

We have your recent correspondence with which you have enclosed a copy of Public Law 90-148 adopted by the 90th Congress and dated November 21, 1967, commonly known as the Air Quality Act of 1967. You ask whether Section 108(k) of that act is legally binding and could be carried out by the Federal givernment in the event Chicago "does not call an alert" under certain emergency conditions set forth in your letter; what the City of Chicago's liability would be if operations for the burning of high sulfur fuel were restricted in the event lawsuits are brought against the City for any loss sustained; and also whether there are other legal aspects pertaining to the Clean Air Act or to your calling an alert of which you should be aware.

With respect to Section 108(k), it is our opinion that if the Attorney General of the United States secures evidence that a particular pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons and that appropriate state or local authorities have not acted to abate such sources, he may bring appropriate action in the Federal District Court to enjoin any contributor to the alleged pollution for the purpose of stopping the emission of contaminants.

The petition for injunction authorized by Section 108(k) appears to be against the contributor to alleged pollution, rother than against the City, unless the City is such a contributor. If the City is a contributor, presumably the City would be permitted to respond to such a suit and present such evidence as may refute such a conclusion. In the event the Federal District Court is persuaded that the City is involved in contributing to pollution and enters an order restraining the emission of contaminents into the air, the City would be legally bound thereby. If the City were not sued as a contributor, its position with respect to any suit against other contributors to pollution within the City of Chicago would be the same as in any other lawsuit of this kind; namely, that an order of court requiring contributors to air pollution to stop emissions would be binding upon the parties so enjoined. The City of Chicago it be desirous of modifying such an order, would have to participate in the suit, either as a party if so joined, or by intervention if not joined in the suit, to seek to present its own position in such matters.

With respect to your second question, the liability of the City of Chicago with respect to the restriction of operations for the burning of high sulfur fuel

would depend upon the nature of the evidence secured by your Department prior to the restrictions being imposed. Should the evidence be of such character as would demonstrate imminent and substantial endangerment to the health of the community, it is our opinion that the City has ample authority to impose emergency restrictions reasonably calculated to ameliorate the situation and eliminate the danger. (See *e.g.,* Ill. Rev. Stat. 1969, Ch. 24, Par. 11-19-11.) The award of damages under such circumstances appears unlikely. It is also possible, under appropriate circumstances, that the City of Chicago and its employees may assert immunity from the type of damage suit you have hypothesized. (See, *e.g.,* Local Government and Governmental Employees Tort Immunity Act, Ill. Rev. Stat. 1969, Ch. 85, Pars. 1-101, *et seq.)*

Your last question, with respect to other legal aspects, pertaining to the Clean Air Act or calling an alert, of which you should be made aware, is quite broad and may be more appropriately discussed in conference wherein specific questions may be posed and answers thereto formulated.

ENFORCEMENT OF THE HARBOR POLLUTION CONTROL ORDINANCE

(Commissioner, Department of Environmental Control—F. G. S.—August 6, 1970)

Your recent letter addressed to Richard L. Curry, Corporation Counsel, requesting a written opinion on questions relating to enforcement of the Harbor Pollution Control Ordinance, Chapter 17, Article V, Municipal Code of Chicago, has been referred to the undersigned for reply.

In your item numbered 1 you state that Article V speaks of "harbor" but does not define what constitutes the harbor. You inquire if the provisions of the ordinance apply to those portions of the Chicago River and its branches, the Calumet River and its branches. The Cal-Sag Canal, the Sanitary and Ship Canal and the North Shore Channel lying within the limits of the City of Chicago. We call your attention to Chapter 38, Section 38-1 of the Municipal Code (copy attached) which defines "harbor", Sections 38-4 through 38-7 of the Code (copy attached) deal further with the matter of what institutes "harbor" as divided into districts.

It is our opinion that the Chicago River and its branches, the Calumet River and its branches, the Cal-Sag Canal, the Sanitary and Ship Canal and the North Shore Channel lying within the limits of the City of Chicago are part of the "harbor" as defined in Chapter 38, Section 38-1 of the Municipal Code of Chicago, and the provisions of Chapter 17 Article V of the Municipal Code are applicable thereto.

Your observation in item numbered 2 of your letter, that the penalty provisions of Section 17-5.7 do not apply to violations of Section 17-5-6, is correct. Appropriate amendments, amending Section 17-5.7 and adding a new Section 17-5.8 have been prepared to remedy this omission. A further amendment to Section 17-3.15 has also been prepared, which would make the fines and penalties therein contemplated consistent with similar provisions now contained in Articles II and VI and as provided for in the suggested amendment to Article V.

It should further be noted that a similar amendment with respect to fines and penalties has not been proposed for Article IV, "Noise and Vibration Control", since this article is under study by your Department. Consideration to amending Article IV, insofar as fines and penalties are concerned, can be given at the conclusion of your study.

The final question you raise in your item numbered 3 is;

"Does the Harbor Pollution Control Ordinance give the Commissioner Of Environmental Control, under Section 17-5.7, the authority to require reconstruction of deteriorated riverbank structures and if so, what penalties can be

assessed for failure to comply with the rules and regulations regarding reconstruction promulgated by the Commissioner?"

It is our opinion that Section 17-5.7 gives the Commissioner of Environmental Control no authority to require reconstruction of deteriorated riverbank structures or to promulgate rules and regulations regarding reconstruction or to impose penalties for failure to comply with rules and regulations regarding reconstruction, but that said authority lies with the Port Director as provided for in Section 38-34 of the Municipal Code.

The Commissioner of Environmental Control, in appropriate cases, should communicate to the Port Director any instances that come to his attention where reconstruction or repair to deteriorated riverbank structures is required, with a request for appropriate action in accordance with the authority vested in the Port Director and (if necessary) in the Commissioner of Buildings.

We trust this answers the questions you submitted.

HARBOR POLLUTION CONTROL ORDINANCE

(Commissioner, Department of Environmental Control—R. N. K.—May 28, 1970)

Your recent letter addressed to Mr. Richard Curry, Corporation Counsel, has been referred to the undersigned for response. You state that the Harbor Pollution Control Ordinance requires that boats equipped with toilet facilities be further equipped with an approved type retention tank to store wastes for subsequent disposal at a shoreside facility. Many toilet facilities are equipped with a manually operated diversion valve which permits waste discharge either to the water or to the retention tank. You request an opinion as to whether a boat owner or operator is in violation of the Ordinance if he fails or refuses to seal the diversion valve. You further inquire as to whether the Commissioner of Environmental Control has the authority to summarily declare an unsealed diversion valve an unapproved type of device or must he make a rule or regulation with the advice and consent of the Advisory Committee.

Chapter 17, Section 17-5.1 of the Municipal Code of Chicago provides in part that no person shall discharge in the harbor or anywhere in Lake Michigan within ten miles of the corporate limit any refuse. Section 17.5-4 of said Chapter provides in part that vessels and boats equipped with toilet facilities be further equipped with a waste retention tank.

There is no requirement in Chapter 17 of the Municipal Code of Chicago that waste retention tanks have a sealed diversion valve. However, if a diversion valve is operated in such a manner as to permit discharge into Lake Michigan there would be a violation of Section 17-5.1.

Chapter 17, Section 17.5.7 provides that the Commissioner of Environmental Control shall have the authority to promulgate rules and regulations necessary to the effective control of harbor pollution. Section 17-1. 11 (11) of said Chapter provides in part that the duties of the Commissioner shall be to make all needful rules and regulations, with the advice and consent of the Advisory Committee to accomplish the purposes of this Chapter.

Therefore, in order to prohibit an unsealed diversion valve, you should promulgate a rule or regulations, with the advice and consent of the Advisory Committee, requiring a boat owner or operator to seal the diversion valve in a position which prevents discharge to the water.

CLARIFICATION OF PHOSPHATE ORDINANCE PROVISIONS

(Commissioner, Department of Environmental Control—H. F. W.—April 11, 1972)

We wish to acknowledge receipt of your letters of April 3, 1972 and March 23, 1972, in which you request a clarification of the provisions of the phosphate ordinance in particular, Section 17-7.3 of Chapter 17 of the Municipal Code of Chicago, as it applies to the storing and warehousing of non-complying soaps and detergents. You attached copies of letters from Lever Brothers Company and Colgate-Palmolive Company to your letter, which we herewith return to you.

Section 17-7.3 of the phosphate ordinance, entitled Limitations, deals with and controls the selling, the offering for sale and the giving or furnishing of detergent products to consumers within the corporate limits of the City of Chicago. The ordinance does not limit or control the shipment of non-complying soaps and detergents nor does it ban the storage or warehousing of non-complying soaps and detergents while they are in the stream of intra-state or inter-state commerce. We should not interpret our ordinance to prohibit the storage or warehousing of non-complying soaps and detergents within the city limits. To do so, would ineffect be declaring that our local ordinance is an interference with and a restraint on the free flow of goods in inter-state commerce in violation of the Commerce Clause of the Constitution of the United States.

In answer to the questions raised by both Lever Brothers Company and Colgate Palmolive Company, it is the opinion of our office that it would be lawful for the soap companies to store non-complying soaps and detergents in warehouses within the City of Chicago for shipment to customers and retailers in areas that are outside of the City limits and not subject to the provisions of our phosphate ordinance.

CHARGE FOR USE OF FIRE DEPARTMENT AMBULANCES

(City Comptroller—S. R. D.—September 28, 1970)

We acknowledge receipt of your recent communication requesting our opinion as to whether the Amendment to the Ambulance Ordinance, passed on August 10, 1970, p. 8950 [you give the date as July 24, 1970] is "broad enough to permit me to credit the revenues to a special revenue account in the Corporate Fund, so as to maintain a record of the proceeds from this operation." The Amendment to Chapter 103 of the Municipal Code of Chicago, covering the use of ambulances operated by the Fire Department, and the charge to be made therefor, reads in part as follows:

> "103-6.1. The Department of Fire shall charge each person $40.00 per trip for ambulance service rendered from a person's home or residence and said sum shall be deposited in a special account in the City's Comptroller's Office for use in expanding and maintaining the Department of Fire Ambulance Service.
>
> "103-6.2. The ambulance service of the Department of Fire of the City of Chicago shall transport the patient from his home or residence to the nearest hospital approved by the Board of Health for the provision of emergency medical care service."

You state that if the fees are to be deposited in a special account "that all expenditures for ambulance maintenance and repairs and for salaries of all persons engaged in the ambulance service must be charged" to the special account. In our opinion, the budgeting for ambulance maintenance, repairs and salaries for personnel engaged in the ambulance service and the account to be charged therefor should be left to the discretion of the City Council.

Meanwhile, we are of the opinion that the Ordinance of August 10, 1970, is broad enough to permit the City Comptroller to credit the revenues from the ambulance service to a special revenue account in the Corporate Fund.

MOBILE CORONARY CARE AMBULANCES

(Chief Department Physician, Fire Department—M. S.—May 28, 1971)

This is to acknowledge receipt of your recent letter addressed to this Department. In your letter and the attachments enclosed therewith you describe a project to develop mobile coronary care ambulances sponsored by the Myocardial Infarction Committee of the Chicago Heart Association, in which the cooperation of the Chicago Fire Department Ambulance personnel is sought. You request an opinion as to whether your authorization of this project would place the City of Chicago in any sort of compromising position, particularly in regard to stages I and II of the project.

Your letter and attachments indicate that there will be no financial involvement on the part of the Fire Department; that the crews will be trained by cardiographic records will be done by the physician members of the committee. on Heart Attacks and all readings, interpretation and analysis of the electrocardiographich records will be done by the physician members of the committee. You further note that Dr. Louis Cohen M.D., Chairman of the committee, states in his letter that there is no danger or risk to the patient, that is only a diagnostic test and involves no needle punctures or manipulation of the body.

It is our opinion based on the information you furnished, that no legal liability would accrue to the City of Chicago by your participation in this project.

JURISDICTION OF FIRE PREVENTION BUREAU OVER HOSPITALS

(Assistant Director, Chicago Hospital Council—B. H. G.—September 24, 1969)

Your recent request to Raymond F. Simon, Corporation Counsel, for an opinion as to the jurisdiction of the Fire Prevention Bureau of the City of Chicago over hospitals and smoke barrier doors has been forwarded to the undersigned for reply.

Although this office is prohibited from advising persons other than city government personnel as to the effect of the law, you may wish to consult Chapter 137, Section 137-9 of the Municipal Code of the City of Chicago, which reads as follows:

> "The building or buildings used or to be used as a hospital shall comply with the building provisions and fire regulations of this code applicable thereto."

Chapter 12, Section 12-24 of the Municipal Code of Chicago reads as follows:

> "The division marshal in charge of the bureau of fire prevention shall examine the plans of all proposed business units one or two stories in height and occupying a ground area of more than four thousand square feet, all business units three or more stories in height, all multiple dwellings containing more than six dwellings, all institutional buildings, hazardous units, class I garages, theaters, open air assembly units, public assembly units, churches, schools and other buildings and structures occupying the ground area of more than four thousand square feet or more than three stories in height, and shall pass on all questions relating to the safety of life and property from fire. No permit for such building shall be issued until the said plans have been approved by the said division marshal and so stamped by him."

Chapter 53, Section 53-3 of the Municipal Code of the City of Chicago reads as follows:

"(a) Partitions enclosing corridors required as a means of exist and partitions enclosing bedrooms or bed wards shall be of non-combustible construction providing fire resistance of not less than one hour. All door openings in such partitions shall be protected with doors not less fire resistive than solid wood doors one and three-fourths inches thick. Glazed openings required for observation shall be protected with materials not less fire resistive than wire glass one-quarter inch thick.

"(b) In every Institutional Unit hereafter erected, altered or converted, over two stories in height, every floor over 8,000 square feet which contains bed rooms or wards shall be divided into two areas by a standard fire wall as provided in section 62-1. The openings in said fire wall shall be protected by standard Class A, double, automatic fire doors and the corridor openings and the doorways of rooms used for patients shall be wide enough to permit passage of the patients' beds."

We would suggest that your attorney, after consulting the above sections cited and fully informed as to the facts, would be in a position to advise you.

RETENTION OF DISABLED FIREMEN

(Fire Commissioner—M. S.—August 25, 1971)

Your letter addressed to Richard L. Curry, Corporation Counsel of the City of Chicago has been referred to the undersigned for attention and reply.

In your letter, you request an opinion as to whether the Fire Department is required to maintain on its payroll an employee who has been disabled due to circumstances that are not related to or caused by his duties with the Fire Department.

More particularly you requested an opinion as to whether the Fire Department must maintain on its payroll an employee who is incapable of performing his duties due to his being hospitalized for alcoholism.

In answer to the first question, Chapter 12, Section 15 of the Municipal Code of Chicago provides in part, as follows:

"12-15. Any member of the fire department *receiving any injury or becoming disabled* so as to prevent him from attending to his duties as such member of the fire department shall, for the duration of twelve months, providing his disability shall last that time, or for such portion of twelve months as such disability or sickness shall continue, receive his usual salary and such disability shall not be considered as rendering necessary his retirement from service in the fire department during such period." (Emphasis Supplied)

It is apparent that the ordinance in using the word *any,* precludes a distinction being made between an injury or disability related to or caused by his duties and some other unrelated source. In each circumstance the Fire Department is obligated to maintain him on its payroll as provided by the ordinance.

The second paragraph of said ordinance, however, provides as follows:

"In the event *a dispute arises* as to the disability of the member or *the nature* or *cause* of his injury, such dispute shall be referred to a committee consisting of the fire commissioner, the president of the civil service commission, and the president of the Firemen's Association of Chicago for investigation and disposition, and a certified copy of their findings shall be filed with the comptroller." (Emphasis Supplied.)

To ascribe to the foregoing paragraph the ability to challenge an injury or disability on the grounds that it was not caused by or related to his duties in the

Fire Department would make the two paragraphs incompatible, especially when the ordinance does not set guide lines as to what constitutes a challenge for cause.

It is our opinion that the provisions in the second paragraph can be used as the basis for refusing to maintain on your payroll an employee whose disability is due to alcoholism. Alcoholism has consistently been recognized by the legislature of our State as a ground for refusing ordinary disability benefits. Chapter 108½, Article 6, Fireman's Annuity and Benefit Fund—Cities over 500,000, Section 6-152, Illinois Revised Statutes provides in part:

> "Any fireman who is not eligible for minimum annuity, who becomes disabled after the effective date as a result of any cause other than the performance of an act or acts of duty, and *other than as a result of alcoholism* or venereal disease infection, shall have a right to receive ordinary disability benefit during any period or periods of such disability, after the first 30 days of disability." (Emphasis Supplied.)

To give the second paragraph of the ordinance any meaning, the least it could imply is a challenge on the grounds stated in the statute. If you desire to remove the fireman in question from the payroll during his disability a committee as provided for by the ordinance should be convened.

LIABILITY OF PROPERTY OWNERS TO FIREMEN FOR DAMAGES CAUSED BY FIRE

(Fire Commissioner—S. R. D.—September 10, 1970)

We acknowledge receipt of your recent communication in which you state that Fire Snorkel No. 7 was extensively damaged and Fire Fighters John Walsh and Edward Weidrich sustained injuries when the wall at the seven-story warehouse of the Garcy Corporation, 1750 N. Ashland Avenue, Chicago, collapsed. At the time, Snorkel No. 7 was engaged in washing down operations after a 5-11 fire at the permises.

You request our opinion as to whether the Fire Department and the firemen can sue the owners of the building to recover damages for failure to maintain the building in a safe condition.

In *Dini* v. *Naiditch* [1960], 20 Ill. 2d 406, plaintiffs sued the owners of a building for the injury and death of city firemen, allegedly caused by the property owner's negligence and statutory violations in the maintenance of the premises. The jury rendered a verdict in the sum of $235,000 for personal injuries sustained by Fireman, Gino Dini, and $20,000 for the wrongful death of Fire Captain Duller. The trial court set aside the jury verdict on the ground that there was no legal basis for liability. The court, in describing the conditions of the premises on the night of the fire, said (pp. 410-411):

> "With reference to the condition of the premises on the night of the fire, one of the residents testified that two garbage cans on the first floor of the hotel were full and overflowing, and that paper was piled about a foot high on the floor. Another resident, who returned home abount 11 P.M., said that three or four garbage cans in his section of the fourth floor were full, with paper piled around the cans so that he had to 'cross around.' According to firemen who fought the blaze, they could see rubbish in the hotel corridor when they reached the second floor of the building, as well as trash and litter on the stairs. Moreover, there were no fire doors according to the testimony of the deputy fire marshal who was on the premises during the fire and made a minute inspection after the fire, and that of the chief building inspector, and of the division fire marshal who was also inside the building during the fire and directed the fighting of the blaze. Nor were there any fire extinguishers of any kind in the hotel, according to the original admission of Naiditch and the testimony of residents who had lived there for three or

four years, and that of the police detective who examined the premises after the fire."

The court, in holding that the plaintiffs had a cause of action against the defendant, reversed and remanded the judgment of the trial court with directions to reinstate the jury verdicts in favor of the plaintiffs, saying (pp. 416-417):

> "Inasmuch as firemen obviously confer on landowners economic and other benefits which are a recognized basis for imposing the common-law duty of reasonable care . . . we . . . would agree with the court in the *Meiers* case, and with its adherents, that an action should lie against a landowner for failure to exercise reasonable care in the maintenance of his property resulting in the injury or death of a fireman rightfully on the premises, fighting the fire at a place where he might reasonably be expected to be.
>
> * * * *
>
> "In the instant case, from the evidence previously noted that defendants failed to provide fire doors or fire extinguishers, permitted the accumulation of trash and litter in the corridors, and had benzene stored in close proximity to the inadequately constructed wooden stairway where the fire was located, the jury could have found that defendants failed to keep the premises in a reasonably safe condition and that the hazard of fire, and loss of life fighting it, was reasonably foreseeable. Hence, since there was legal basis of liability in this case, it was error to set aside the jury verdict and enter judgment notwithstanding the verdict."

and further (p. 421):

> "We must, therefore, recognize, as an additional basis of liability, defendants' alleged violations of the particular fire safety ordinances and that the owners, defendants Naiditch, cannot avoid such liability on the ground that the premises were leased. (*City of Chicago* v. *Sheridan and Co.*, 18 Ill. App. 2d 57 (1958); *Landgraf* v. *Kuh*, 188 Ill. 484). We have already noted that there was some evidence from which the jury could reasonably find that defendants were in fact guilty of violating these ordinances, and that such violations proximately caused the injuries of plaintiff Dini and the death of Captain Duller. Therefore, it was reversible error for the trial court to enter judgment notwithstanding the verdict with respect to these claims."

The general principle of law set forth in the *Dini* case, where the Illinois Supreme Court first established the status of a fireman to be that of an invitee and imposed the duty upon the owner or possessor of a building to not negligently injure him, has subsequently been limited in application.

In *Netherton* v. *Arends* [1967], 81 Ill. App. 2d 391, plaintiff sued the landlord and tenant of certain premises seeking damages as a result of injuries sustained while in the performance of his duties as a fireman. The acts of negligence charged in the complaint were (p. 393):

> "(A) Caused or knowingly permitted large quantities of inflammable straw to be placed against the foundation of the dwelling in such manner as to create a fire hazard'; (B) a like charge as to having large quantities of highly inflammable and volatile gases; (C) a like charge as to having large quantities of combustible plastic materials; (D) a like charge as to having certain acids; (E) a like charge as to having ether; (F) a like charge as to having gunpowder, and (G) otherwise negligently and carelessly maintained said premises so as to cause or permit the same to catch fire. Paragraph four then alleged that as a direct and proximate result of said negligent acts or omissions, a fire 'occurred on said premises and in said dwelling.' Paragraph five alleged that 'as a direct and proximate result of one or more of the aforesaid negligent acts or omissions on the part of the defendants, he [plaintiff fireman] was overcome and severely and permanently injured by the inhalation of noxious and dangerous fumes, gases and smoke produced by said fire."

The court, in deciding that the complaint did not state a cause of action, said (pp. 394-396):

"[1] Paragraph four alleges that the negligent acts or omissions of the defendants were the direct and proximate cause of the fire on the premises. As alleged they were the direct and proximate cause of the event which brought the fireman to the premises. We think we may judicially observe that the negligent acts or omissions of an owner or occupier frequently causes fires which bring the fireman to the premises. The duty is then imposed upon such owner or occupant to not negligently injure the fireman after he gets there. In Dini, the plaintiff was injured not because of the fire itself or any of the causes of the fire, but because a defective stairway collapsed. The fireman was where he had a lawful right to be and it was an inadequately constructed stairway which caused the injury. In Meiers v. Fred Koch Brewery, 229 NY 10, 127 NE 491, the fire chief proceeded to the property. While walking in a driveway in the dark, he fell into a coal hole and was injured. Liability was predicated upon the defendant's failure to provide adequate lighting and a safe passageway. In Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 NW2d 549, a defective wall fell upon and injured the fireman. Defendant, having knowledge of the defect and the opportunity to warn the fireman, was held liable for failure to warn of a hidden peril. These cases, as well as Dini, illustrate the type of circumstances or conditions where the common law has erected a duty to an invitee fireman. In each instance the negligent act or omission causing the fire was not the act or omission causing the injury to the fireman. We do not think that Dini holds or intended to hold that negligently creating a fire hazard or causing a fire ipso facto creates a liability upon an owner or occupant to an invitee fireman for injuries received in the performance of his duties. We know of no court that has. As we read Dini the condition of the premises (in multiple violations of a municipal code 'intended to prevent a disastrous fire or loss of life in case of fire') made a fire reasonably foreseeable and the condition of the stairway made injury or loss of life to one engaged in fighting the fire reasonably foreseeable. We know of no rule of law or common practice which prohibits the possession of the materials described in this complaint in or about a habitation. The mere having of such materials on the premises standing alone even though knowingly done creates no foundation for a charge of negligence. The manner or method of keeping, containing, or using such materials might pose a hazard to an invitee to the premises. This complaint fails to charge how or in what manner they were kept, maintained, contained or used. It does not allege how they were in any manner hazardous to an invitee. It does allege that 'under the circumstances then existing it constituted negligence" but does not state those circumstances. It further alleged that they were placed or remained in the dwelling 'in such manner as to create a fire hazard', an allegation which the trial court in his memorandum properly characterized as a conclusion of the pleader. Why or how they created a fire hazard is not stated.

"Even more elusive in the complaint is why or how they proximately cause the plaintiff to be 'overcome and severely and permanently injured by the inhalation of noxious and dangerous fumes, gases and smoke produced by said fire.' There is no charge that the fumes, gases or smoke produced by the fire were unusual in any manner or different in type, quantity, quality or amount that those of any ordinary fire. In the absence of such a charge, the hazards which the fireman faced were only those hazards incidental to the employment that was his. In the absence of such a charge the duty of the defendants is no different than that of any owner or occupant in any residential fire. To hold otherwise is to open the sluice gates to a liability where none has heretofore existed. To hold otherwise is to add a second layer to the cake and say that negligently causing a fire is the proximate cause of injury to the fireman without alleging why or how or in what manner this is so. Epitomizing, the duty of an owner or occupant of premises to an invitee fireman is a duty to warn of known latent defects in the premises which with a reasonable degree of foreseeability might cause injury to him, or to avoid defects in the premises which with a reasonable degree of foreseeability

might cause injury either to him or any other invitee, or to use ordinary care to have his premises in a reasonably safe condition for use in a manner consistent with the purpose of the express or implied invitation. 38 Am Jur, Negligence, ¶ 96, p 754. In our judgment this complaint fails to allege any facts or circumstances encompassing any of these situations. Such being the case, no duty upon whose breach a cause of action can subsist."

In *Horcher* v. *Guerin* [1968], 94 Ill. App. 2d 244, the plaintiff brought suit for injuries sustained while fighting a fire on the premises owned by the defendant. The various violations charged in the complaint were permitting (p. 249):

"(1) the foundation walls to be in a state of disrepair; (2) the presence of rats and vermin; (3) broken and inoperative windows; (4) broken and cracked walls; (5) sagging floors; (6) an inadequate and defective electrical system; (7) improper space heaters; and (8) a general dangerous, unsafe, dilapidated and unsanitary state of repair."

The jury rendered a verdict for the plaintiff, but the trial court entered a judgment for the defendant notwithstanding the verdict. The Appellate Court sustained the judgment of the trial court, stating (pp. 247):

"We do not read Dini, however, to stand for the proposition that the landowner may be held liable to a fireman for negligence in causing the fire which brought the fireman to the premises. It is held, almost without exception, that a landowner or occupier is not liable in such case. Jackson v. Velveray Corp., 82 N.J. Super 469, 198 A.2d 115, 118 (1964); Krauth v. Geller, supra, 130, 131; 35 Am. Jur. 2d, Fires, § 45. As to the fire itself, it is the fireman's business to deal with this particular hazard. He is trained and paid for this. Undoubtedly, most fires can be attributed to negligence of some nature. Therefore, public policy dictates that a landowner does not owe a duty to firemen, upon which liability may be predicated, to exercise care that a fire does not occur on his premises. The exposure to liability which would result from such rule would impose an unreasonable burden upon a person who owned or occupied improved land.

"The duties of a fireman expose him to risk of harm from fire: this is a reasonable risk of his occupation. The landowner owes a fireman, as well as an invitee, a duty not to expose him to an unreasonable risk of harm—that is, a duty to remove hidden, unusual or not to be expected dangers from the premises, or to give adequate warning thereof."

The court reviewed the evidence and concluded that the plaintiff did not prove actionable negligence on the part of the defendant, saying (pp. 249-250):

"A number of the purported violations could only relate to possible causes of the fire and would not support a cause of action. Others, such as the presence of rats and vermin, have no relevancy to the issues before us. The only ordinances having a possible connection with any alleged breach of duty owed by the defendants to the plaintiff, as a fireman, were the Rooming House Ordinance, or Building Code, with reference to the inoperative windows. The violation of an ordinance designed for the protection of human life or property is prima facie evidence of negligence, and one injured thereby may have a cause of action if he comes within the purview of the particular ordinance, and the injury has a direct and proximate connection with the violation. *Dini* v. *Naiditch, supra,* 417, 418; *Schwartz* v. *City of Chicago,* 63 Ill. App. 2d 416, 422, 211 N.E. 477 (1965). Even if we concede that the plaintiff, as a fireman, was within the purview of the ordinances relating to inoperative windows—particularly, the provision of the fire prevention code prohibiting obstruction to windows—we cannot conceive how this directly and proximately contributed to his injury.

"The fire chief testified that he was in charge of fighting the fire; that he gave no orders to ventilate while the firemen were in the building; and that the order to ventilate was given after the firemen vacated the building and

after his decision that the building could not be saved. It was then that the windows were broken. The plaintiff chose to use a ladder for this purpose. There were then no firemen on the second floor and no attempt was then made, or could have been made, to open the second story windows from the inside.

"The testimony clearly indicated that both the top and bottom window panes were broken. Even if the windows had been opened, it is obvious that the glass in them would have to be broken to accomplish full ventilation. Thus, it is evident that if there were negligence in permitting the windows to be stuck or inoperative, the requisite causal connection between such negligence and the injury—for liability to be imposed—is absent."

A complete annotation on the duty and liability of an owner or occupant of premises to a fireman or a policeman coming on the premises in the discharge of his duty is found in 86 A.L.R. 2d 1205 and in Later Case Service, Supplementing 86 A.L.R. 2d, at page 135.

Your communication states that the wall collapsed "at the scene of the fire while Snorkel No. 7 was engaged in washing down operations." In the absence of additional facts, we are of the opinion that the collapsing of the wall did not, in and of itself, give rise to the requisite causal connection between the injuries to the fireman or the damage to the snorkel and the alleged liability to be imposed on the property owner. The collapsing of the wall did not raise a presumption of negligence on the part of the property owner. From the facts disclosed, it does not appear that the owner of the building negligently injured the fireman or damaged the snorkel. Rather, it appears that the injuries to the fireman and the damage to the snorkel was due to the fire itself. It was a hazard which, under the law, was assumed by the firemen and the Fire Department.

In light of the foregoing, we are of the opinion that the collapsing of a wall after the fire and during "washing down operations" did not give rise to a cause of action against the owners of the building.

TORT IMMUNITY FOR FIRE FIGHTING

(Fire Commissioner—D. P.—March 29, 1971)

On March 17, 1971, the Supreme Court of Illinois affirmed the judgment of the Circuit Court of Cook County in the above-cited case. The suit involved a personal injury allegedly incurred when a city fireman lost control of a fire hose which struck and injured the plaintiff. The city relied on the Illinois Tort Immunity Act which exempts public employees from liability for injuries caused while they are engaged in fighting a fire.

The plaintiff argued that the Tort Immunity Act was unconstitutional because (1) state law permits recovery for injuries caused by the negligent operation of a fire department vehicle, but not for those caused by fire fighting operations; and, (2) because municipal liability was allegedly different from the liability imposed upon fire protection districts. Both distinctions, the plaintiff argued, were unreasonable and, therefore, unconstitutional.

The Circuit Court granted the city's motion for judgment on the pleadings. The Supreme Court affirmed, holding that it was not unreasonable to provide tort immunity for fire fighting operations but to permit liability for negligent operation of fire department vehicles; the Court held further that the liability for fire protection districts is no broader than that of municipalities. As a result of the Court's decision, the present scheme of tort immunity for fire department operations remains intact.

MINORITY HIRING IN THE FIRE DEPARTMENT

(U.S. Attorney, Northern District of Illinois—R. L. C.—March 12, 1973)

Your letter of January 30, 1973, which advocates a "Consent Decree" between the U.S.A. and the City of Chicago for the purpose of setting a goal for minority hiring in the Chicago Fire Department appears to be premised in error. The error being (quoting from your letter), "that the City will, we understand, begin to recruit and hire again for the Fire Department in the near future."

The National Loss Control Service Corporation's 1971 Management and Operations Study of the Chicago Fire Department (Maatman Report) has determined, after an exhaustive review of the Department and its mission, that the total manpower strength be set at 2,820 Firefighters. The Fire Department's current strength is 3,009 Firefighters, or 189 over the recommendation. It is the policy decision of the Department to reduce its strength to the Maatman figure by attrition within the ranks rather than by any general lay off. With 32 compulsory retirements scheduled for 1973, it is obvious that no recruitment or hiring is likely in the foreseeable future.

I am confident that you will agree that goals for minority hiring must be in harmony with the overall hiring needs of the Department. Until such time as the Fire Department is in need of an infusion of new personnel, and until those precise numbers are ascertainable, it is meaningless to suggest long range goals or an annual quota for hiring black or Spanish surnamed persons. A "Consent Decree" under these conditions would be merely an illusory remedy in that it would produce no new job opportunities.

Without the pressure of early hiring needs in the Fire Department, and mindful of the dramatic impact which "validation" has placed upon personnel testing agencies, the Civil Service Commission is currently engaged in the task of developing background data and job analysis information so that a job-related Firefighter's examination which meets the EEOC requirements may be available later this year.

No truly "validated" Firefighter's examination has been developed anywhere in the country despite the great need for the same. This important work should be permitted to continue without judicial restraints and without the imposition of preconceived quotas. The principles of merit employment are not at war with the concept of equal employment opportunity. To the extent that the Civil Service Commission seeks to serve and affirm both of these laudatory goals, its contemplated test battery should be encouraged and the results of its efforts awaited without reservation.

If the Commission is successful in developing a truly validated examination for Firefighters in compliance with the EEOC "Guidelines On Employee Selection Procedures," it will be a breakthrough of national significance which would more than justify patience on the part of the Justice Department. If the results are found not to be satisfactory, or if the test does not conform to the standards mandated by *Griggs* v. *Duke Power* and its progeny, then legal action by the Federal government would certainly be more timely and more relevant than any judical determination (by consent or otherwise) at this time.

It is my hope that the reasons stated will compel your concurrence that a Consent Decree at this time serves no worthwhile purpose but may, in fact, be counterproductive to the cause of equal opportunity in the Fire Service both here and nationally.

DISCRIMINATION IN THE EMPLOYMENT OF FIREMEN

(U.S. Attorney, Northern District of Illinois—R. L. C.—June 12, 1972)

Your letter of May 24, 1972, forwarded an undated letter of David L. Norman, Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C., which states in part "on the basis of our investigation we have concluded that the city is engaged in a pattern or practice of discrimination in its employment of firemen".

Be informed that the City of Chicago formally and emphatically rejects such a conclusion and seriously questions the premise stated by Mr. Norman that such conclusion is based on *any* meaningful "investigation" whatsoever. To my knowledge, no dialogue whatsoever has been had between the Department of Justice, Civil Rights Division, and any responsible officer of either the Chicago Fire Department or the Civil Service Commission, which by State law conducts the testing for both original entry and promotion not only within the Fire Department but for all classified Civil Service employees in both the City and the Board of Education service. Testing manuals, recruitment program guides, grading procedures, sample questions, examination standards, public service announcements and community information bulletins appear also to have been ignored in the investigation to which the Civil Rights Division refers.

Mere recital of the statistical composition of the Chicago Fire Department does not give rise to the "inference of discrimination" to which Mr. Norman would ascribe. Fairness and responsibility would demand that before a charge of this nature be made nothing less than an exhaustive and comprehensive study be undertaken in cooperation with the city agencies involved. Facts and truth, not inferences and allegations, should ground any assertion "that the City is engaged in a pattern and practice of discrimination in its employment of firemen".

In addition to statistical information, which is relevant but certainly not determinative of the issue of discrimination, any review of the Civil Service procedures utilized by the City in hiring and promoting the firemen would, of necessity, take cognizance of and measure fully (1) the impact of the State Civil Service laws on the question of local latitudes in recruitment, testing and promotion; (2) the affirmative steps taken within the law by the Civil Service Commission to encourage more applicants from the black and Spanish speaking communities; (3) the experience gained by the Civil Service Commission from these local initiatives and (4) the validity of the testing procedures and their relevance in selecting qualified personnel from among the applicants.

You should be aware that the City is currently defending litigation in the Federal District Court which alleges in part that discrimination exists in the Fire Department. The impact which any "finding" by the Department of Justice would have on such litigation must be obvious. The potential for prejudice to the City's defense of this matter is further justification for caution on your part and for an in depth review of all facts prior to any conclusions.

I know of no instance where City agencies have faulted in their responsibility to assist your office in inquiring into matters involving the operation of local government. The record of the City departments in providing fair and equal employment opportunities to all citizens regardless of race is one of achievement and one which clearly invites review and comparison. This being the case unilateral action, which the Department of Justice appears to be endorsing relative to this sensitive public issue and the 20 day ultimatum which it has served, is completely unwarranted.

Unless your options are foreclosed by reason of the involvement of the Washington based Civil Rights Division, I would suggest a review of the action taken thus far and an opportunity for the appropriate City agencies to provide that input which any unbiased fact finding effort would compel.

INDEMNIFICATION BY CITY WHERE CHICAGO FIRE DEPARTMENT IS ASSISTED BY SUBURBAN DEPARTMENTS

(Fire Commissioner—A. H.—April 11, 1969)

Your communication to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response. You state:

> "During the recent civil disorders which plagued our city, the suburbs of Chicago fulfilled their commitments relative to our existing Mutual Aid agreements and dispatched manpower and equipment to assist the Chicago Fire Department.
>
> "These suburban Firefighters have their own insurance to cover liabilities, and I believe Workmen's Compensation would be adequate for any normal contingency. However, the question arises in my mind as to what extent the City of Chicago would indemnify in the event of an untoward incident involving suburban personnel, such as fatal injury to one of their Firefighters, or fatal injury caused by their Firefighters. Incidentally, this isn't my thinking solely; as a matter of fact, some of the suburbs have raised this same question."

The municipal authorities of the City of Chicago have been delegated the power by the Legislature to enter into mutual aid agreements, as set forth in Section 11-6-1 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, Ch. 24, Par. 11-6-1). It is our opinion that in an emergency such as you have exemplified, wherein the Chicago Fire Department has already committed the bulk of its personnel and equipment to that type of situation, and is called upon to render service within the City which it therefor cannot fulfill, any request by the Fiire Commissioner or his duly authorized agent to outlying municipal fire departments and fire protection districts for assistance would be justified and we would advise the City Council that indemnification for any untoward incident such as you suggest would be within its power and jurisdiction.

APPARATUS ACCIDENT DISCIPLINARY BOARD PROCEDURE

(Fire Commisioner—S. R. D.—March 25, 1969)

We acknowledge receipt of your communication requesting our opinion as to whether it "would be in accordance with the City of Chicago policy" to require members of Local 2 to be represented on the Fire Department Apparatus Accident Disciplinary Board; and, also, whether an employee ordered to appear before the Disciplinary Panel is entitled to be furnished a statement of charges or accusations, names of witnesses, transcript of proceedings and right to be represented by counsel.

Fire Department Order No. 529, issued September 7, 1966, creates the Apparatus Accident Disciplinary Board. The order provides that the Board shall consist of five members and be composed of the following:

"1—1st Deputy Chief Fire Marshal as mediator

3—2nd Deputy Chief Fire Marshals

1—Fire Engineer AS THE DRIVER INSTRUCTOR."

The order states that "the purpose of the Board will be to review all apparatus accident reports and decide whether disciplinary action is warranted."

Section 65 of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department, provides:

> "Upon being notified of accidents in which the Fire Department personnel, apparatus or equipment may be involved and which occur in their divisions or other assignments during their tour of duty. Division Fire Marshals shall immediately proceed to the scenes, cause investigations to be made of the conditions and circumstances appurtenant thereto, supervise the preparation of reports and forward them immediately to the Fire Commissioner's Office."

Section 165 of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department, provides:

> "The Fire Alarm office shall be notified and fully informed without delay of street accidents occurring while companies are responding to, or operating at fires, or other emergencies, or of other instances where the City of Chicago may become involved. After the care of the injured or clearance of wreckage, if any, has been accomplished and the names and addresses of witnesses secured, a detailed report thereof shall be forwarded immediately, through channels, to the Fire Commissioner."

It is apparent from the foregoing that the function of the Apparatus Accident Disciplinary Board is purely administrative. Its sole purpose is to assist the Fire Commissioner in determining whether any member of the Fire Department, whose duties pertain to the operation of fire apparatus, was negligent in the operation of the fire apparatus. The scope of inquiry of the Apparatus Accident Disciplinary Board is purely fact-finding. It leaves to the Fire Commissioner the ultimate question of whether the fireman was negligent in the operation of the fire apparatus and whether disciplinary action should be taken against him.

Under Fire Department Order No. 529, the membership of the Board consists of high-ranking Fire Department officials having responsible administrative duties. Because of their position in the Department, it is presumed that they will perform their duties as members of the Board with impartiality, fairness and for the sole purpose of keeping the Fire Department at a high standard of efficiency. The order creating the Apparatus Accident Disciplinary Board contains no provision relative to the union affiliations of its members. This leaves the Fire Commissioner in a position to exercise his sole discretion as to who should be appointed to the Board, based solely on the ability of the appointed individuals to perform the duties assigned, without consideration of party affiliations.

In light of the foregoing, it is apparent that the members of the Apparatus Accident Disciplinard Board should be, and are, appointed on the basis of their ability to perform the duties assigned and not on the basis of their union affiliations.

The Disciplinary Panel, which investigates misconduct of all members of the Fire Department, is, likewise, solely investigative and fact-finding. It was created for the sole purpose of assisting the Fire Commissioner in determining whether disciplinary action should be taken against a member of the Fire Department. It reports its findings-of-fact to the Fire Commissioner. The Fire Commissioner has the sole power, authority and discretion to determine whether he shall bring disciplinary proceedings against a member of the Fire Department.

The purpose of the Disciplinary Panel is merely to advise the Fire Commissioner as to the results of their investigation. The hearings before the Panel have no legal status. They do not result in a decision. They are not binding on either the fireman or the Fire Commissioner.

It is the Fire Commissioner who has the sole discretion to determine whether the fireman violated the Rules and Regulations of the Fire Department, and whether the facts justify a dismissal of the complaint against the fireman, a reprimand, a suspension from the Department for a period not to exceed

30 days, or the bringing of charges before the Civil Service Commission for the discharge of the fireman from the service of the City of Chicago.

Section 10-1-18 of the Civil Service in Cities Act (Ill. Rev. Stat. 1967, Chap. 24, par. 10-1-18) recites when official proceedings are to be instituted against a civil service employee. It provides, in part, as follows:

> "Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. * * * Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 7 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. * * *"

Under the foregoing provisions it is not until written charges have been filed before the Civil Service Commission that an employee is entitled to "an opportunity to be heard in his own defense". Under Section 10-1-18 (Ill. Rev. Stat. 1967, Chap. 24, par. 10-1-18) a civil service employee may be suspended "for a reasonable period, not exceeding 30 days except that an employee or official suspended for more than 7 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension."

Under Section 10-1-18, the Fire Commissioner has full authority to reprimand or suspend a fireman for a period not to exceed 30 days without filing formal charges against him. It is only after the Fire Commissioner has filed charges with the Civil Service Commission, or has suspended a fireman "for more than 7 days or suspended within 6 months after a previous suspension" and a hearing before the Civil Service Commission has been requested by the fireman that there is a hearing as contemplated by Section 10-1-18. It is at that point, and only at that point, when written charges must be filed and the fireman given an opportunity to be heard, that the fireman is entitled to a statement of charges or accusations, names of witnesses, transcript of proceedings and right to be represented by counsel. Prior thereto, neither the Civil Service in Cities Act nor the rules of the Fire Department provide for or contemplate a formal proceeding as requested by Local 2.

In light of the foregoing, we are of the opinion that the Apparatus Accident Disciplinary Board, created by Fire Deportment Order No. 529, need not have a member of Local 2 on the Board; and that a fireman is merely being investigated by the Disciplinary Panel prior to the filing of charges and the holding of a hearing before the Civil Service Commission, as provided by Section 10-1-18 of the Civil Service in Cities Act, and, therefore, at a hearing before the Disciplinary Panel he is not entitled to a transcript of proceedings, a statement of charges, names of witnesses and to be represented by counsel.

CREATION OF FIREMAN'S ARBITRATION BOARD

(City Council—A. H.—March 6, 1968)

On February 20, 1968, the Circuit Court of Cook County entered an order, by Judge Thomas C. Donovan, finding, among other things, that a dispute exists concerning the wages, hours of labor, or the conditions of employment of the members of the Fire Department of the City of Chicago, and directing that a writ of mandamus be issued commanding the corporate authorities of the City of Chicago to take all steps necessary and requisite to the end that a Firemen's Arbitration Board be created and appointed, according to the Illinois Revised Statutes, Chapter 24, Article 10, Division 3, Sections 8, 9, 10 and 11.

It should be observed that the constitutionality of the above-cited statute provisions was recently affirmed by the Illinois Supreme Court in *Illinois Ass'n of Fire Fighters* v. *City of Waukegan,* 37 Ill.2d 423.

Accordingly, it is respectfully suggested that the procedures necessary to create a Firemen's Arbitration Board be undertaken, as outlined in the Illinois Revised Statutes cited above.

CHICAGO PUBLIC LIBRARY

(City Comptroller, L. A. L.—J. E. S.—June 13, 1968)

Your recent letter requested that this office advise:

(a) Whether Sections 6, 7, and 8 of the By-Laws of the Chicago Public Library, proposed for adoption on April 8, 1968, be revised in accordance with existing statutes?

(b) Whether the trust funds of the Library be invested and held by the City Treasurer rather than by the Board of Directors of said Library? and

(c) Whether or not selection, purchase and binding of books, as discussed in Section 8 is in conflict with the provisions of the Municipal Purchasing Act?

Answering (c) above, Article 4-8, Chapter 81, Ill. Rev. Stat. 1967, specifically provides that the Board of Directors of the Chicago Public Library shall be governed by the provisions of Division 10 of Article 8 of the Illinois Municipal Code in relation to the letting of contracts and purchase orders in behalf of the Library.

Thus, the reference in Section 8 to the selection, purchase and binding of books, is legally limited by the Purchasing Act and would appear to be nothing other than a purely internal library determination as to which Committee within the Board of Directors would have responsibility in selecting books by title; in determining the number and time of purchase and in determining the type of binding desired, as examples, and to then so advise the Purchasing Agent for his further statutory action.

Answering (b) above, Article 1-6, Chapter 81, Ill. Rev. Stat. 1967, provides that any person desiring to make donations of money, personal property or real estate for the benefit of a public library, may vest the title to the money or real estate in the board of directors of such library to be held and controlled by such board, when accepted, according to the terms of the deed, gift, devise or bequest of such property. The board shall be held and considered to be a special trustee of such donated property.

Although Article 3-10-1, Chapter 24, Ill. Rev. Stat. 1967, recites in essence that the Municipal Treasurer shall receive all money belonging to the municipality, it does not follow, in our opinion, that a deed, gift, devise or bequest of property as a charitable purpose to the Chicago Public Library for the purpose of aiding the support thereof, would be classified as monies belonging to the municipality. As long ago as *Crerar* v. *Williams,* 145 Ill. 625 (1893) it was held that a gift for the erection, creation, maintenance and endowment of a free public library in a City like Chicago, falling within the definition of a charity or charitable use, could not be seriously questioned and it has likewise long been held that a governmental body has power to receive property in trust for educational purposes, including a public library. It would likewise follow, in our opinion, that such a gift made pursuant to Article 1-6, aforesaid, being made for a specific charitable purpose or charitable use, would not be within that category of funds contemplated by Section 3-10-1 as monies belonging to the municipality, and,

therefore, the provisions of Article 1-6 of Chapter 81 would not be inconsistent with the provisions of Article 3-10-1 of Chapter 24 so long as the funds or the trust funds of the library were in actuality funds received solely by deed, gift, devise or bequest and were not at any time commingled with funds received from public sources.

However, this department would further find nothing legally objectionable if the Comptroller did, from time to time, examine such funds to ascertain the status thereof.

Answering (a) above, Sections 6, 7 and 8, when read in association with Articles 1-1 through 5-9 of Chapter 81, are not inconsistent therewith. As discussed supra, the basic purpose of the sections is for the internal operation of the library and any action thereunder would of necessity be governed by said statute and other pertinent statutes as therein cited.

LAND ACQUISITION PROCEDURE

(Director, Chicago Public Library—E. L. N.—June 25, 1970)

In accordance with our conferences, we wish to outline the procedure for land acquisition as established by the Corporation Counsel's office and approved by the City Council of the City of Chicago.

It should be noted at the outset that the ultimate responsibility for land acquisition and the Court proceedings to acquire land is vested in the Corporation Counsel's office. This is predicated primarily upon the fact that appraisals are now subject to discovery on proper court order; therefore, it is imperative that our office order, review and approve any appraisal for the acquisition of land for the City of Chicago or any of its agencies.

The following is a brief outline of the procedure which we recommend that your agency follow to expedite the acquisition of real property for library use and to insure that in each instance, the fair cash market value is paid to the owner—no more and no less:

1. A resolution by the Board of the Chicago Public Library authorizing the acquisition should be forwarded to the Corporation Counsel's office requesting that appropriate steps be taken to acquire the property.
2. On receipt of the resolution, the Corporation Counsel's office will prepare an appropriate Ordinance and introduce same to the City Council.
3. After the Ordinance is duly adopted, our office will order the necessary appraisals, prepare the necessary letters of offer, and proceed with all steps necessary to acquire the property.
4. Prior to the acceptance of any offer to sell, the purchase price is approved by the Mayor's Review Committee, the Finance Committee of the City Council and the City Council.

ANNUITY PROGRAM FOR EMPLOYEES OF CHICAGO PUBLIC LIBRARY

(Chief Librarian, Chicago Public Library—S. R. D.—April 13, 1971)

We acknowledge receipt of your communication requesting our opinion as to whether the employees of the Chicago Public Library are eligible to participate

in "a plan for a tax-sheltered annuity program as provided under Section 403(b) of the Federal International Revenue Code."

Section 403(b) of the Federal Internal Revenue Code provides, in part, as follows:

> "If * * * an annuity contract is purchased * * * for an employee who performs services for an educational institution (as defined by Section 151(e)(4), by an employer which is a State, a political subdivision of a State, * * * then amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such amounts does not exceed the exclusion allowance for such taxable year."

Section 151(e)(4) of the Code defines an "educational institution" as follows:

> "For purposes of this paragraph, the term 'educational institution' means only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on."

The Chicago Public Library is not an "educational institution" as defined in Section 151(e)(4) of the Code and, therefore, we are of the opinion that its employees are not qualified to participate in a "tax-sheltered annuity program as provided under Section 403(b) of the Federal Internal Revenue Code."

"PRICE FIXING" IN THE SALE OF BOOKS TO PUBLIC BODIES

(Executive Vice President, Lerner Home Newspapers—J. E. S.—February 1, 1968)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel, requested information generally regarding a possible suit by the City of Chicago on behalf of the Chicago Public Library against eighteen book publishers who have been charged with a conspiracy to fix prices on the sale of children's books to schools and libraries.

In answer to your query, the City of Chicago has joined as a petitioner with other public bodies including, as example, the Commonwealth of Massachusetts, the states of Ohio, Wisconsin and Indiana and the cities of New York and San Francisco, in a matter entitled "In Re Grand Jury Proceedings, No. 66 CJ 3003" in the United States District Court for the Northern District of Illinois, Eastern Division, which matter relates to the production of documents pertinent to the matter in question. We would be pleased from time to time to advise of the then current status of this matter.

DEFINITION OF THE "CITY OF CHICAGO" AS A POLITICAL SUBDIVISION OF THE STATE

(President, The Staff Association of the Chicago Public Library—M. J. D.—October 27, 1970)

Your letter requesting an opinion of the Corporation Counsel concerning the definition of the "City of Chicago" in terms of a political subdivision of the state, has been referred to the undersigned for consideration and response.

In *Littell* v. *City of Peoria* 374 Ill. 344, 347, 29 NE 2d 533 (1940) the court defined municipalities, while considering whether police legislation pertains to a governmental function or is a matter of local concern:

"The municipalities affected by the Policemen's Minimum Wage Act are political subdivisions of the State organized for governmental purposes."

Chapter 24, Paragraph 1-1-2, subparagraph (1) (Ill. Rev. Stat. 1969) states in part:

" 'Municipal' or 'Municipality' means a city, . . ."

Chapter 43, Paragraph 166 (Ill. Rev. Stat. 1969) states in part:

" 'Political subdivision' means a . . . city, . . ."

The City of Chicago must therefore be considered as a political subdivision of the State of Illinois.

SENIOR CITIZENS GROUPS AS NOT-FOR-PROFIT CORPORATIONS

(Director of Division for Senior Citizens, Department of Human Resources—F. V. K.—February 9, 1970)

Your letter addressed to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for response. You present nine questions you wish answered relating to not-for-profit corporations as a possible form of organization for senior citizens groups. The law regulating and controlling not-for-profit corporations in Illinois is found in the General Not For Profit Corporation Act at Chapter 32, paragraph 163a et. seq. of the Illinois Revised Statutes (1967), a copy of which is enclosed.

Following are the questions you presented with the answers deemed pertinent.

1. Under what circumstances should a senior citizens group obtain a charter?

Under the provisions of the General Not-For-Profit Corporation Act the obtaining of a certificate of incorporation is voluntary and should be done only if the particular senior citizens group feels that its ends would best be served by doing so. In making that determination each group considering incorporation should seek the aid of legal counsel. As an aid in making that determination the senior citizens groups are directed to Sections 3 and 4 of the Act which refer to the Act's applicability and purpose respectively.

2. If they decide to apply, what information will they need?

The information needed to apply is that necessary to complete the articles of incorporation. The articles of incorporation will require such information as the corporate name, the purpose for which the corporation is formed, the period of duration of the corporation, the name and address of the incorporators and other information relating to the corporate powers and authority. For a more complete and detailed listing of the information needed the senior citizens groups should be directed to Section 29 of the Act.

3. Where and how does one file an application?

In order to become a non-for-profit corporation under the General Not For Profit Corporation Act, the incorporators must file duplicate originals of the articles of incorporation with the Secretary of State pursuant to Section 30 of the Act. Who may be an incorporator and how many incorporators are necessary to file the articles of incorporations are provided for in Section 28 of the Act.

4. Are there any qualifications so far as the group is concerned?

For a senior citizens group to qualify under General Not For Profit Corporation Act, the group must be organized for anyone of a number of purposes. Organizations that are either charitable, social, religious, patriotic or political will qualify under the Act. For a more complete listing of purposes that qualify,

the groups should be referred to section 4 of the Act. The senior citizens group must also have three incorporators who are natural persons that are citizens of the United States and twenty-one years of age or more as provided for in section 28 of the Act. These people are essential to the filing of the article of incorporations.

5. Are there any responsibilities so far as the group is concerned—reports, etc.?

Any corporation which is created under the General Not For Profit Corporation Act is imposed with the responsibility of following the procedures provided for in the Act. Under the Act corporations are required to compile and file an annual report. The procedures governing the report and its filing are found in sections 63 and 64 of the Act. Other obligations imposed upon corporations under the Act are found in the various sections of the Act which relate to procedures the corporations must follow in specific situations. For example, there are procedures provided for in the Act which govern amending the articles of incorporation, liquidation of the corporation, voluntary dissolution of the corporation, corporate meetings and voting procedures. In any event, the senior citizens groups should be told whenever a question in this area arises advice of legal counsel should be sought.

6. How much does a charter cost?

The fee for filing the articles of incorporation and issuing a certificate of incorporation is $75.00 as provided in Chapter 32, paragraph 157.127 of the Illinois Revised Statutes (1967). The fees charged in filing other documents which may become necessary to the corporation, are also found in the above cited paragraph, a copy of which is enclosed.

7. Why do some groups need a charter in order to operate?

Under the General Not For Profit Corporation Act there is no requirement that any specific group must incorporate. Incorporation as an organizational structure for any specific senior citizens group is a choice which should be made only after the group discusses the matter with legal counsel. The reasons for incorporation may vary with any one particular group.

8. What program possibilities should be restricted without a charter, i.e., tax free status, eligibility for federal or other grants, name protects, etc?

The answer to the above question would depend upon which program possibility any one particular group was seeking. To determine the effect of not incorporating on the tax free status of a senior citizens group, the groups should be advised to contact the Internal Revenue Service which is located at 22 West Madison Street in Chicago. A group's eligibility for federal funds and aid from other sources would only be determined by checking with the particular agency from which the funds are sought. These agencies will provide the group with the qualifications they deem necessary. Whether a group is incorporated or not will have no effect on the protection of the name. The law entitling certain names to protection does not draw any distinction between whether the name represents a corporation or not.

9. If one of the group's purposes is to obtain tax free status in connection with raising money, is this the only qualification or just the first step?

For information relating to the qualifications necessary for a group to become a tax exempt organization, we suggest that the individual group be directed to the Internal Revenue Service at 22 West Madison Street in Chicago. They are the agency which determines the qualifications for tax free status.

At this point, some comment should be made on the propriety of the Commission's proposed undertaking in this area. The above cited nine questions you propound in your letter are couched in general terms and the answers to them may not particularly apply to a specific group. Each senior citizens' group seeking to become a not-for-profit corporation will have its own unique set of circumstances and attempting to generally categorize answers to legal questions that may arise on the topic could prove very misleading. By preparing such a pamphlet the Commission may be involving itself in the practice of law, which, as is evident, would be an undesirable result.

PROPOSED "PUBLIC INFORMATION" CENTERS

(Alderman Aiello Ward—H. N. L.—June 28, 1972)

Upon studying the proposed ordinance regarding the erection of information centers in the City of Chicago, we notice several problems that are left unanswered.

The term "public information" is vague and too broad. It is not clear to what it refers. It could mean topics as diverse as current events, national affairs, political ideology, civil rights or personal campaigning. As it reads, the ordinance would allow practically anybody to disseminate any type of information from the center. The center could become a pulpit for the dissemination of personal opinions.

If one information center espouses one view, someone with opposing views may very well demand the opportunity to disseminate their views from centers. If the city refused them, the city could be accused of favoring one opinion over another when it had no such intention. The limitation of "public information" is too broad and could readily lend itself to abuse. The type of information that such a center should disseminate should be concisely specified. While the type of information should not be unreasonably restricted or censored, there should be more definite guidelines as to just what type of information the centers are intended to disseminate.

Another problem that arises is that the proposed ordinance does not indicate who shall determine whether the center obstructs the public way or creates a hazard. There is no city official named who has the duty to determine that the center conforms to the requirements of the ordinance. The result is that the requirements could never be effectively enforced.

In addition to those defects mentioned, the ordinance does not limit the size of the centers except for the prohibition that they shall be "in such size and dimension so as not to obstruct the said public way." It is not clear what type of structure is contemplated.

Finally, the question arises whether it is proper to have the city comptroller issue the permit. The city comptroller has supervisory authority over the officers of the city who are charged with the receipt, collection or disbursement of the city revenues. There are other officers of the city whose specific duty would be more suitable for handling the requirement of issuing permits than the comptroller. One or these more appropriate officers should be given this duty.

Therefore, there does appear to be several problems with the proposed ordinance, the most important of which is that it is not clear what the general purpose of the ordinance is.

RESPONSIBILITY FOR REPAIR OF DOCK WALL

(Commissioner, Department of Public Works—F. G. S.—May 12, 1971)

Your letter of May 5, 1971, addressed to Richard L. Curry, Corporation Counsel, regarding repair of the Dock Wall on the North Branch of the Chicago River has been referred to the undersigned for attention and reply. You request an opinion concerning responsibility for repair of the riverbank dock wall under three different sets of circumstances, namely,

1. where a public street or alley parellels the riverbank;

2. where the property line coincides with the bank of the river; and

3. where the course of the river was altered about 1920 and the property formerly occupied by the river subsequently reverted to the owner of the

subdivision and was resold for a residence adjoining the new river course. Section 38-34 of the Municipal Code of Chicago provides as follows:

"38.34. Every owner of premises abuting on the Harbor, or any portion thereof, shall at all times keep and maintain in a state of good repair and in safe condition all wharves, docks, piers, seawalls, slips, riverbank retaining walls, riverbank bulkheads, dolphins, booms, bulkheads, jetties, mooring facilities, pilings, sheetings and other similar structures on or appurtenant to such premises. Every violation of this Section shall constitute a separate and distinct offense for every day such violation shall continue. The Port Director shall notify in writing such owner of any violation of this Section and direct him to restore or repair such structure within a reasonable time. In addition, any nuisance now existing or which may hereafter result from an owner's failure to keep and maintain such wharves, docks, piers, seawalls, slips, riverbank retaining walls, riverbank bulkheads, dolphins, booms, bulkheads, jetties, mooring facilities, pilings, sheetings and other similar structures on or appurtenant to such premises in a state of good repair and in a safe condition shall also be subject to abatement as provided in Chapter 99 of this Code."

Also please see previous opinion of Corporation Counsel dated December 10, 1964, relating to the same subject matter (25 Op. Corp. Couns. 80.)

In view of the provisions of the above section and our earlier opinion, it is our opinion that where a dedicated public street or alley parallels the riverbank, the City would bear the responsibility for the repair of the riverbank dock wall. It is our further opinion that where the property line of a private owner coincides with the bank of the river, and where the altered course of the river has created a property line of a private owner which coincides with the bank of the river, the owner of the property which abuts the river would bear the responsibility for repair of the riverdock wall which extends along the bank of the river for the width of his property.

IDENTIFICATION OF VEHICLES OPERATED BY DEPARTMENT OF PUBLIC WORKS

(Commissioner, Department of Public Works—A. H.—February 13, 1969)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel, in which you request advice with respect to regulations governing the wording, insignia and motto to be painted on automotive and non-automotive vehicles under the jurisdiction of the Department of Public Works, has been referred to the undersigned for consideration and response.

Please refer to Chapter 2 of the Municipal Code of Chicago, Section 2-7, which provides as follows:

"The municipal device, for use by the varied unofficial interests of the city and its people, shall show a Y-shaped figure in a circle, colored and designed to suit individual tastes and needs.

"All automobiles and other vehicles which are owned by the city, except those used by the commissioner of police, and the detective bureau of the department of police, shall be distinctly marked as the property of the city by painting or placing thereon in a conspicuous place, in such a manner that the same cannot be removed, "the municipal device, together with the words 'City of Chicago,' and the name of the department operating the said automobile or other vehicle."

We trust that the foregoing provision contains sufficient guidelines upon which to govern the identification of automotive and non-automotive vehicles under the jurisdiction of the Department of Public Works.

RIGHT-OF-WAY ACQUISITION PROCEDURE

(Commissioner, Department of Public Works—T. A. F.—December 22, 1967)

Contrary to our understanding after extensive discussion with your right-of-way people:

1. The legal and factual sufficiency of the appraisals obtained by your office was not discussed with nor approved by the Corporation Counsel's Office.

2. The amount to be offered in the initial attempt to agree was not discussed with nor approved by the Corporation Counsel's Office.

In accordance with my advice to your office that your proposed negotiation procedure is ineffective and dilatory, we have been notified by your office that only *one* of the twenty-four (24) parcels on which negotiations have been initiated by your office has been agreed upon.

Contrary to your statement in your letter of December 20, 1967, despite your failure to comply with our understanding, your office has been notified that suit will be filed on the first fifteen (15) parcels before December 31, 1967. This is being done at your insistence even though such a procedure (suits filed on small groups of parcels) is wasteful of public funds expended on court costs and publications.

Since we do not agree that the success of the project is dependent upon a cooperative effort to acquire the right of way quickly and efficiently, I reiterate that land acquisition be handled by this office in its totality since this office is qualified to do so both by law and experience.

CHAPTER II—RIGHTS AND DUTIES OF CITY EMPLOYEES

Section A. CIVIL SERVICE

ABSENCE FROM DUTY WITHOUT A LEAVE OF ABSENCE

(Commissioner of Streets and Sanitation—P. M. S.—May 18, 1971)

We are in receipt of your letter requesting that Civil Service Commission charges be prepared against Park Laborer William M. Farrell for violating the rules of the Civil Service Commission by being absent from duty for two pay periods—March 31, 1971 and April 15, 1971—without having applied for a leave of absence.

Our understanding of the facts is that Mr. Farrell informed his superior on the morning of March 11, 1971 that he aggravated a prior injury doing some work the previous day and requested and went to the City Physician on that date; that he did not report for work on March 15, 1971 or thereafter; that the department contacted his home on April 2, 1971 and learned he was in St. Lukes Hospital under the care of his own physician; that the department spoke to him and sent him a Leave of Absence Form on April 2, 1971 which he never executed or returned to the department; that he was discharged from the hospital on April 16, 1971; and that he was suspended on April 20, 1971 for 29 days, said suspension effective as of April 16, 1971.

We have been unable to find any Civil Service Commission rule that specifically requires an employee to apply for a leave of absence when he is absent from duty for two pay periods. The law is quite clear, however, that an employee must have a valid reason for failing to report for duty. The law is equally clear that even when an employee has a valid reason for failing to report for duty he has an obligation to inform his department of this reason. The determination of the validity of the reason offered for any absence rests in the judgment of the department head and is normally a final determination of this matter. A department head also has the right to require an employee to substantiate the reason offered for his absence from duty and to keep the department informed of his status.

It is our opinion that while Mr. Farrell acted improperly is not notifying his department of the reason for his absence until contacted by the department on April 2, 1971, he did not, however, violate any rule of the Civil Service Commission by failing to return the Leave of Absence Form sent to him.

In view of the fact that Mr. Farrell has been suspended for 29 days for his conduct in this matter and the mitigating circumstances with respect to his hospitalization, it is our opinion that it would not be efficacious to institute Civil Service charges against him at this time.

ALDERMAN'S PARTICIPATION IN MUNICIPAL EMPLOYEES FUND

(Municipal Employees Annuity and Benefit Fund—T. A. McG.—November 7, 1967)

In response to your request for an opinion concerning Alderman Vito Marzullo, the following is submitted:

Your letter states that Vito Marzullo, by virtue of competitive civil service examination, and subsequent appointment to a position in the service of the

City of Chicago from a civil service list, automatically became a participant in the Municipal Employees' Annuity and Benefit Fund of Chicago.

When Vito Marzullo took the oath of office as Alderman, he was then granted a leave of absence from his position as Ward Superintendent. By virtue of such leave of absence and having over 10 years of service in such position, he continued to make contributions to the Fund on the basis of his salary as Ward Superintendent. This was done under authorization set out in Section 8-229, Chapter 108½, Illinois Revised Statutes.

Your letter further states that Alderman Marzullo never filed a written application to pay into the Fund after becoming Alderman, but continued his participation in the Fund by virtue of his maintaining his civil service status as Ward Superintendent through the medium of a leave of absence. This authorization was under Section 8-228, Chapter 108½, Illinois Revised Statutes.

Your letter further states that it is Mr. Marzullo's intent to not renew his leave of absence as Ward Superintendent and to terminate such leave by means of a resignation and thereby have further salary deductions for the purpose of the Fund cease with his annuity, therefore, becoming fixed and determined as of the date of his separation from the service as Ward Superintendent.

Your question is whether such salary deductions for the purposes of this Fund may cease if and when Alderman Marzullo terminates his leave of absence and resigns from the service as Ward Superintendent.

It is our opinion that Alderman Marzullo automatically became a participant in the Municipal Employees' Annuity And Benefit Fund of Chicago at the time that he entered the service of the City of Chicago from a civil service list. This membership continued over after Mr. Marzullo was granted a leave of absence from his civil service position as Ward Superintendent. However, Alderman elected to the City Counsel of the City of Chicago must make a specific request to join and participate in the Municipal Employees' Annuity And Benefit Fund of Chicago. Inasmuch as Alderman Marzullo never elected to come into the Fund after becoming an Alderman and never made a specific request to join the Fund as an Alderman, but rather was carried as a member of the Fund by virtue of his leave of absence and having over ten years of service in his position of Ward Superintendent, it is our opinion that if and when Alderman Marzullo terminates his leave of absence and resigns from the service of Ward Superintendent such salary deductions for the purpose of this Fund may cease.

EFFECT OF ARREST RECORD ON APPLICATION FOR EMPLOYMENT AS A POLICE OFFICER

(Personnel Director, Civil Service Commission—E. H.—May 15, 1972)

Your inquiry to Mr. Curry has been referred to me for response.

The question you put to us is to what extent may arrest records be considered in determining the eligibility of an applicant for employment as a police officer.

This issue is presented in the context of the case of Robert F. Whitlow, 3222 W. Douglas Boulevard, Chicago. He applied for the position of patrolman in the Chicago Police Department, participated successfully in a civil service examination, and was certified. But the background inquiry concerning Whitlow, made of the Federal Bureau of Investigation, on the basis of his fingerprints, revealed a record of four arrests. These were:

(1) On July 15, 1962, when he was 15, he was arrested for investigation of an assault. But leave to file was denied by a court within a few hours.

(2) On December 8, 1963, he was charged with disorderly conduct and confined to the County Jail. The record, however, does not show what disposition was made of this charge.

(3) On October 4, 1964, he was arrested for theft of automobile license plates. The charge was dismissed for want of prosecution when the complaining witness failed to appear at the trial.

(4) On April 16, he was charged with theft by receiving lost or stolen property. He had been arrested when he attempted to cash a currency exchange money order which had disappeared from the currency exchange during a racial disturbance. 14 such money orders were found on his person at the time of the arrest. But the record does not indicate what disposition was made of this charge.

Whitlow, in filling out his questionnaire, had failed to mention at least the first two arrests. Upon learning of Whitlow's arrest record the Police Department recommended that Whitlow's certification be withdrawn.

James Fox, a Legal Aid attorney representing the applicant, has filed a brief in which he contends that use of prior arrest records as a factor in determining employment is improper, for several reasons, which we shall examine below.

At the outset, it should be noted that Whitlow's certification was withdrawn pursuant to Civil Service Commission Rule II, § 6. This provides, in part:

"Proof of false statements made in any application . . . shall be grounds for . . . removal from an eligible roster."

Since Whitlow falsified his application by omitting mention of at least his first two arrests, his disqualification on that ground alone was justified.

His attorney might argue that the false statements were irrelevant and immaterial because the question of arrests was improper, and therefore the falsity of his response should not count against him. But it is our position that the questions were relevant to a legitimate inquiry into the applicant's character and therefore the subject matter of the questions was proper.

Illinois Rev. Stat. 1971, Ch. 24, § 10-2.1-6 provides, in part:

". . . No person shall be appointed to the police or fire department unless he is a person of good character; not an habitual drunkard, gambler, or a person who has been convicted of a felony or a crime involving moral turpitude. However, no person shall be disqualified from appointment to the fire department because of such person's record of misdemeanor convictions except those from under Sections . . . of the Criminal Code of 1961 . . ." (citing a number of offenses such as sexual misconduct, theft, perjury and obstruction of justice) . . . "or arrest for any cause without conviction thereon . . ."

Thus, although the statute provides than an applicant for a fireman's job cannot be disqualified because of arrests without convictions, this exemption is not extended to applicants for positions on the police force. The statute is silent in that regard. But the fact that it is extended to the fire department, but not to the police department, cannot be disregarded.

Whitlow's attorney argues that a man is innocent until he is proven guilty. That, as Mr. Fox says, is indisputable. But in concluding from that principle that to use "arrests not resulting in conviction . . . as a bar to employment, would be punishing the innocent," is to confuse the required weight of evidence in convicting of crime with the probabilities that it is reasonable to take into consideration in exercising a discrete judgment in employment matters. Those arrested, but not convicted, are not necessarily innocent.

The statute does not disqualify those arrested, but not convicted, from employment in the Police Department. But the statute does expressly require that they shall be persons of "good character," and Rule II, § 6 of the Rules of the Civil Service Commission states that "bad character" shall be grounds for excluding an applicant or removing him from the eligible roster. As the Illinois Appellate Court stated in *Davern* v. *Civil Service Commission*, 115 Ill. App. 2d 93, at 104 (1969)—a police case, in which decertification of a patrolman was reversed:

"Although bad character" is not defined in Rule II, section 6, it should be stated at the outset that the Commission must have the power to decide what is bad character in a particular case justifying the decertification of an applicant for a Civil Service appointment. In the statute controlling the discharge, in certain municipalities, of Civil Service policemen and firemen for 'cause' (Ill. Rev. Stat. (1965), c 24 § 10-2-1-17), 'cause' is not defined by the Legislature. In interpreting this statute, reviewing courts have held that the administrative agency is to decide what conduct justifies cause for removal. When the Administrative Review Act is involved and the courts are asked to review a final decision of an administrative agency, the judiciary will not reweigh the evidence but will only determine if the order of discharge is not arbitrary but is just and reasonable in the light of the evidence presented to the agency. *Fantozzi* v. *Board of Fire and Police Com'rs,* 35 Ill. App. 2d 248, 256, 182 N.E. 2d 577, 580 (1962); affirmed 27 Ill. 2d 357, 189 N.E. 2d 275 (1963). It is the duty of this court, as it was of the trial court, to examine the evidence presented before the Commission and to determine if its order is supported by the manifest weight of that evidence. *Drezner* v. *Civil Service Commission,* 398 Ill. 219, 226-27, 75 N.E. 2d 303, 307 (1947)."

As a matter of common sense, an arrest record, even without convictions—at least if the record is taken as a whole—can constitute an indication of probable undesirability for certain types of employment, particularly those involving public trust. Certainly a record of arrests intimates that the matter merits further inquiry. The applicant should be questioned about the circumstances of the arrests. His attitude under such examination may well be revealing. A person can be of bad character without having been convicted of a crime. Acquittals sometimes are obtained by improper means or they may result from mere human failure in the prosecution. An experienced police personnel officer should be able to distinguish between an underprivileged youth caught up in a dragnet raid in a problem neighborhood and an applicant with a long record of shady dealings.

But Whitlow's lawyer is on more solid ground when he cites the 1971 amendment to the Illinois Fair Employment Practices Act (Ill. Rev. Stat. ch. 48, § 852 *et seq.*) which provides:

"Sec. 3. It is an unfair employment practice:

"(e) For any employer, employment organization or labor organization to inquire on a written application whether a job applicant has ever been arrested."

The definition of "employer" in that Act (§ 852 (d)) includes:

"(ii) the State and any political subdivision, municipal corporation or other governmental unit or agency thereof . . ."

This amendment is not applicable to Whitlow's case. He was decertified in May, 1971. The amendment was not enacted until the latter part of 1971.

But the amendment is now in effect. We therefore urge you to eliminate questions about arrests from applications for civil service employment.

Such questions are unnecessary, since, on the basis of the applicant's fingerprints, his arrest record can be obtained from the F.I.B. Even though, under *Menard* v. *Mitchell,* D.C. Ctr., 1970, 430 F.2d 486; on remand, 328 F. Supp. 718 (DC, DC 1971), such information may not be available to private employers, the Police Department can still obtain it because it relates to law enforcement. Furthermore, applicants for police employment have the right to an administrative hearing, with representation by counsel, and to judicial review. Applicants for private employment, of course, have no such safeguards. If this inquiry turns up a history of arrests, the applicant can then be questioned about them. His responses, explanations and attitude can thereupon be taken into consideration in evaluating the goodness or badness of the applicant's character.

If this advice is followed, it will obviate the other objections advanced on behalf of Whitlow, based on the United States and Illinois Constitutions and

the federal Civil Rights Act. They do not forbid an inquiry into the applicant's good character. And if the application is then denied, the denial will be based, not on his arrest record, but on his lack of good character.

In short, an applicant for a position in the Police Department can no longer be required to list, in writing his arrests not resulting in convictions. But he can be required to explain such arrests—information of which is obtained by a fingerprint check with the F.B.I.,—since the circumstances of such arrests are relevant to a proper inquiry into his character.

RULES GOVERNING CHICAGO CITY COLLEGE EMPLOYEES

(President, Civil Service Commission—A. H.—November 20, 1967)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response. You have asked for an opinion regarding the validity of certain rules adopted by the Chicago City College which are at variance with the Civil Service Law and Rules of the Civil Service Commission, particularly, Article II, Sections 2-3, 2-5, 2-6(a), 2-7, 2-8 and 2-18 of the Chicago City College Rules.

In our opinion under date of June 2, 1966, we stated that the Board of Junior College District No. 508, now known as the Chicago City College, had the statutory authority to establish its own employment and tenure policies under the Public Junior College Act (Ill. Rev. Stat. 1965, ch. 122, pars. 101-1, *et seq.*), which created said Board. We suggested that the Board of Junior College District No. 508 may seek to continue, in principle, the procedures previously followed in employing non-teaching personnel in the Junior Colleges of the City of Chicago when said Junior Colleges were under the jurisdiction of the Board of Education of the City of Chicago and administered by the City of Chicago Civil Service Commission. We further noted that the Board of Junior College District No. 508 could find it expedient to seek the cooperation of the Civil Service Commission in continuing the classification system and the rights and status of the then employees of the Board of Education who would be transferred to and employed by the new Junior College Board. The Board of Junior College District No. 508 subsequently elected to seek the cooperation of the Civil Service Commission and to continue the employment and tenure policies theretofore in existence as aforesaid.

It must be borne in mind that in adopting previous employment and tenure policies as they existed under the Board of Education and as administered by the Civil Service Commission, the Board of Junior College District No. 508 was nevertheless operating under the authority of the Public Junior College Act, specifically Sections 3-25 and 3-42 (Ill. Rev. Stat. 1965, ch. 122, pars. 103-25, 103-42). There is nothing in the Public Junior College Act, nor in the Illinois Municipal Code, requiring that the Board of Public Junior College must conform to the Civil Service statutes or to any rules adopted thereunder. In fact, amendments approved during the recent legislative session expanded the language of Sections 3-32 and 3-42 relating to employment and tenure by Junior College Boards, which now contain, in part, the following powers:

> "3-32. To establish tenure policies for the employment of teacher and administrative personnel, and the cause for removal.
>
> "3-42. To employ such personnel as may be needed, to establish policies governing their employment and dismissal, and to fix the amount of their compensation. In the employment, establishment of policies and fixing of compensation the Board may make no discrimination on account of the sex, race, creed, color or national origin."

Accordingly, it is our opinion that the Sections of Article II of the Chicago City College Rules to which you have referred need not conform to nor be consistent with the Civil Service statutes and Civil Service Commission Rules, except to the extent desired by the Board of the Chicago City College.

We respectfully suggest that the Civil Service Commission and the Chicago City College Board agree upon such rules as may be desirable to implement the personnel policies contained in Article II aforesaid, and that such changes be made in Civil Service Commission Rules as may be necessitated by reason of those policies, *only* as said rules apply to Chicago City College employees.

REMOVAL FROM POSITION FOR CONFLICT OF INTERESTS

(City Council—M. E. A.—October 9, 1967)

On October 2, 1967, the Illinois Appellate Court reversed a judgment of the Circuit Court of Cook County, which had reversed a finding and decision of the Civil Service Commission of Chicago that Carmen Senese, the plaintiff, be removed from his position as a tree trimmer in the Bureau of Forestry of the Department of Public Works of the City of Chicago. The plaintiff was charged and found guilty of conduct unbecoming an employee of the City of Chicago in that while he was employed by the Bureau of Forestry of the Department of Public Works of the City of Chicago he was also a partner in the firm of Hillside Florists and that sales of flowers arranged by Senese were made to the City by Hillside Florists. The Illinois Appellate Court in reversing the judgment of the Circuit Court and affirming the decision of the Civil Service Commission stated Opinion p. 4):

> "In the instant case, the city employee's related duties as a tree trimmer included the selection of flowers for special occasions. He stated that he 'went to the wholesalers to pick out the flowers and directed the wholesaler to send the flowers to Hillside Florist' (in which he had a financial interest). There is evidence that plaintiff 'solely' placed the orders. He therefore acted in a dual capacity—purchasing on behalf of the City and selling to the City at a profit for himself.
>
> The Civil Service Commission ordered plaintiff removed from his position for cause. 'On administrative review the court does not weigh the evidence and its function is limited to ascertaining if the findings and decisions of the administrative agency are against the manifest weight of the evidence.' *DeGragio* v. *Civil Service Commission*, 31 Ill. 2d 482, 489. The order of the Commission was not against the weight of the evidence, and the court erred in setting it aside."

RIGHTS OF LAID-OFF CIVIL SERVICE EMPLOYEES

(President, Civil Service Commission—S. R. D.—February 4, 1969)

We acknowledge receipt of your communication of January 27, 1969, to which is attached a letter dated January 23, 1969, from the law firm of Shulman, Baum and Marcus, general counsel for the International Union of Operating Engineers, Local 150. They state that several members of Local 150, who are employed by the City, "have been laid off due to a shutdown of certain operations of the city of Chicago", and ask:

> "1. How long must an employee be laid off from work or not work as a result of a shutdown before he can utilize his civil service seniority [sic], for the purpose of bumping other employees with less seniority [sic].
>
> "2. Several of the employees who are not presently working have vacations due them; and accordingly, when are these employees entitled to their vacation, and may they take them at the present time when there is no work available for them."

Rights of civil service employees who have been laid off "through lack of work or funds, or for other cause to reduce the force in any employment in any

department or bureau" are set forth in Section 1 of Rule IX of the Rules and Regulations of the Civil Service Commission, which provides as follows:

> "Lay-offs. Whenever it becomes necessary, through lack of work or funds, or for other cause to reduce the force in any employment in any department or bureau, the person who was last certified to such employment shall be the first laid off. Persons laid off in accordance with the foregoing procedure shall be entitled to have their names placed on the reinstatement list according to the seniority of their certification. Any officer or employee whose position has been abolished for lack of work or funds, may, upon application, have his named placed on the reinstatement list in any lower class from which he was promoted, according to his examination and seniority of certification. Any officer or employee who elects to accept certification to such position in any lower class shall remain on the reinstatement list of the position from whch he was separated on account of lack of work or funds, and on the reinstatement list of any intermediate class in which he has seniority rights, and he shall be eligible to reinstatement in any vacancy occurring in such position in accordance with his seniority rights therein."

The provisions of Section 1 of Rule IX are self-explanatory and, therefore, no further discussion is necessary as to the first inquiry set forth above.

The question as to vacation leave is controlled by "Section G. Holidays, Vacation and Sick Leave for Positions in the Classified Service" of the "Classification and Compensation Plan for City Employees Established for Year 1969" (C.J. 12-13-68, p. 4619). Subparagraph (a) of (2) Vacation Leave (C.J. 12-13-68, p. 4622) provides, in part, as follows:

> "Each salaried or hourly rate employee who occupies a position in the classified service will be granted a vacation with pay of two calendar weeks (10 work days) after he has completed his first full year of service, provided that one week (5 work days) of the initial vacation allowance may be allowed after the first six months of service."

From the foregoing, it is apparent that vacations are given after the work has been completed rather than for work contemplated to be performed at some future date. A civil service employee would not, therefore, be entitled to a vacation in any given year until after the completion of the first six months of service in that year. Subparagraph e) of (2) Vacation Leave (C.J. 12-13-68, p. 4623) provides:

"The department head shall designate when the vacation shall be taken."

Therefore, in answer to the second inquiry set forth above, a civil service employee is not entitled to a vacation until after the completion of the first six months of service in the current year and, then, the vacation can only be taken at the time designated by the department head.

Summarizing the foregoing, we are of the opinion that layoffs of civil service employees are controlled by the provisions of Section 1 of Rule IX of the Rules and Regulations of the Civil Service Commission; and that the question of when a civil service employee may take a vacation is controlled by the provisions of Subparagraph G of the "Classification and Compensation Plan for City Employees Established for Year 1969."

NATURALIZATION REQUIREMENTS FOR CIVIL SERVICE

(President, Chicago Civil Service Commission—M. S.—March 4, 1968)

This is to acknowledge receipt of your recent letter addressed to Mr. Raymond F. Simon, Corporation Counsel of the City of Chicago, in which you request an opinion whether the Civil Service Commission has the authority to waive the citizenship requirement and accept applications from persons who have not completed the naturalization process.

Chapter 24, Section 10-1-7 of the Illinois Revised Statutes, 1967, provides in part as follows:

> "All applicants for offices or places in the classified services except those mentioned in Section 10-1-17 and members of the fire and police departments who have been appointed, or shall hereafter be appointed, to their respective positions by the board of fire and police commissioners under the provisions of Division 2 of this Article, shall be subject to examination, which shall be public, competitive, *and open to all citizens of the United States,* with specified limitations as to residence, age, health, habits and moral character." (Emphasis supplied)

The Courts of Illinois have held that the Civil Service Commission of Chicago exercises a limited or statutory jurisdiction, and that no presumption of jurisdiction obtains in its favor and it must find in the statute its warrant for any authority claimed. *People ex rel. Hurley* v. *Garber* 405 Ill. 331. See, also, Opinions of the Corporation Counsel of the City of Chicago Volume XXI, page 60, which holds the opinion that the Civil Service law requires all applicants for positions in the classified service of the City to be citizens of the United States. There has been no change in the wording of the statute in respect to citizenship from the date of said opinion to the present.

In view of aforecited authorities, we are of the opinion that the Civil Service Commission of the City of Chicago has no authority to waive the citizenship requirement and to accept applications from persons who have not completed the naturalization process.

CIVIL SERVICE EXAMINATIONS FOR TEACHER AIDE & SCHOOL COMMUNITY REPRESENTATIVE

(President, Chicago Civil Service Commission—A. H.—May 7, 1970)

We have your recent letter in which you seek our opinion with respect to whether the Civil Service Commission can conduct examinations for positions such as Teacher Aide and School Community Representative under certain conditions which you outline, or not.

You propose to hold a separate examination for said positions in each of the school districts in the City of Chicago to consist of two parts, namely, 1) an evaluation of education and work experience, and 2) an oral examination, placing certain conditions upon taking the examinations. The reasons given for your proposed approach are that the nature of the positions vary from district to district and the qualifications will, therefore, differ from district to district. You postulate as an example the ability to speak Spanish in certain districts, or knowledge of a particular neighborhood, which may be an essential factor in the selection process.

You propose to have employed in said categories persons who are interested in working in specific areas of the city near their place of residence, presumably, so that their contact with the community will be intimate and continuing irrespective of working hours. Because of the importance of continuity in said positions, you propose a requirement that transfers between districts be limited to geographically contiguous districts upon the recommendation of the Board of Education and the approval of the Civil Service Commission, which will be expressly stated in the examination announcement.

Our analysis of Section 10-1-7 of the Municipal Code of Illinois (Ill. Rev. Stat. 1969, ch. 24, par. 10-1-7) reveals that the examination of applicants for offices or places in the classified service ". . . shall be public, competitive and open to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. . . . Such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which

they seek to be appointed. . . ." In consideration of the foregoing, quoted language, it is the opinion of this office that the Civil Service Commission can conduct examinations for positions such as Teacher Aide and School Community Representative under the conditions set forth above, upon the assumption that the varying qualifications for each district can be shown to be necessary and relevant to the specific position involved. The evaluation of education and work experience must, of course, be considered under uniform examination values and the oral examination should contain questions uniformly asked of each applicant for each of the districts in question.

UNFAIR EMPLOYMENT PRACTICE COMPLAINT

(Area Representative, Fair Employment Practice Commission—F. G. S. —May 31, 1973)

We acknowledge receipt of the charge filed by Ms. Bertha L. Howell alleging an unfair employment practice committed by the Chicago Police Department. Ms. Bertha L. Howell believes she was discharged because of her religion, Catholic and her sex, female. Please consider this communication our response to said charge as provided for in your rules.

The Chicago Police Department is an agency of the City of Chicago and said Chicago Police Department and the City of Chicago admit being an employer as defined in Section 2(d) of the Illinois Fair Employment Practices Act. It is denied that any action taken regarding Ms. Bertha L. Howell was based on her religion or her sex.

Ms. Bertha L. Howell was employed on July 6, 1970 in the non civil service position of Community Service Aide. The Community Service Aide Program is entirely federally funded. She held this position until April 5, 1973. During her tenure as a Community Service Aide, Ms. Howell compiled good attendance and work records.

On March 22, 1973 the Project Director for the Community Service Aide Project received instructions to phase down the Community Service Aide Project from a personnel complement of seventy-one (71) police officers and three hundred and forty-four (344) Community Service Aides to a complement of twelve (12) police officers and eighty-one (81) aides, because of reduced federal funding. As a result between April 1, and April 8, 1973, the project was forced to terminate the employment of two hundred and sixty (260) Aides. One hundred and thirty-five (135) female Aides and one hundred and twenty-eight (128) male Aides were terminated. Retained in the project were forty-nine (49) females and thirty-two (32) males.

It should further be noted that the work force for the Community Service Aide Plan Project must be recruited from specified areas according to federal guidelines. Ms. Howell worked in the Woodlawn Target Area, one of six areas designated by the federal guidelines. The Woodlawn Target Area Aide complement at the time of the phase down due to reduced federal funding consisted of thirty-five (35) females and twenty-eight (28) males. After the reduction in force, the work force of Community Service Aides for the Woodlawn Target Area consisted of seven (7) females and five (5) males. Ms. Howell was one of fifty-one (51) employees, (twenty-eight (28) females and twenty-three (23) males) terminated in the Woodlawn area solely due to the fact that insufficient federal funds were available to retain the staffing level.

We submit that there is no basis in fact for Ms. Howell's charges. We respectfully move that your Commission enter an order dismissing the charge as well as ordering that no complaint be issued against the Chicago Police Department for the reasons stated above.

It is further moved, inasmuch as the Corporation Counsel of the City of Chicago is the executive head of the Law Department of the City of Chicago and is responsible for the representation of all City of Chicago Departments, Agencies,

Bureaus, employees and officers, when they are acting in the course of their responsibilities for the City of Chicago, that a copy of all charges, complaints, communications and findings be served on the Corporation Counsel of the City of Chicago at Room 511, City Hall, 121 North LaSalle Street, Chicago, Illinois 60602.

UNFAIR EMPLOYMENT PRACTICE COMPLAINT

(Division of Field Operations, Fair Employment Practices Commission —F. G. S.—May 30, 1973)

We acknowledge receipt of the charge filed by Shirley Sivels alleging an unfair employment practice committed by the Chicago Police Department. Shirley Sivels believes she was discriminated against because of her sex, female. Please consider this communication as our response to said charge as provided for in your rules.

The Chicago Police Department is an agency of the City of Chicago and said Chicago Police Department and the City of Chicago admit being an employer as defined in Section 2(d) of the Illinois Fair Employment Practices Act. It is denied that any action taken regarding Ms. Shirley Sivels was based upon her sex.

Shirley Sivels was employed in a temporary capacity (non civil service) in the Chicago Police Department as a Junior Clerk. On June 8, 1972 Shirley Sivels submitted her resignation and as her reasons stated the following:

"I would like to resign for maternity reasons. I would appreciate any references which may help me to get rehired if possible, providing that I do have a good working reference, and that I'm a responsible person."

Chicago Civil Service Commission Regulations and Chicago Police Department Rules and Regulations do not provide for leaves of absence for any purpose for temporary (non civil service) employees.

Ms. Sivels applied for reemployment with the Chicago Police Department in January, 1973. At that time a review of her employment history revealed reports from three (3) supervisors stating she had a poor attitude toward her job, in that she was unresponsive to correction, and resented any counselling from her supervisors. In addition, she was not compatible with her co-workers and was very argumentative.

It should be noted that Ms. Shirley Sivels had no Civil Service status and therefore her reemployment after her resignation was entirely a discretionary matter with the agency and the decision not to reemploy her was totally unrelated to her sex.

We respectfully move that your Commission enter an order dismissing the charge as well as ordering that no complaint be issued against the Chicago Police Department for the reasons stated above.

It is further moved, inasmuch as the Corporation Counsel of the City of Chicago is the executive head of the Law Department of the City of Chicago and is responsible for the representation of all City of Chicago Departments, Agencies, Bureaus and employees and officers, when they are acting in the course of their responsibilities for the City of Chicago, that a copy of all charges, complaints, communications and findings be served upon the Corporation Counsel of the City of Chicago at Room 511, City Hall, 121 North LaSalle Street, Chicago, Illinois 60602.

VACATION RIGHTS OF A CITY EMPLOYEE

(City Comptroller—S. R. D.—December 19, 1967)

We acknowledge receipt of your recent communication requesting our opinion as to whether or not William Cochran, who has worked for the City for approximately thirteen years and retiring on December 31, 1957, is entitled to be paid for three weeks vacation to cover his projected 1968 vacation. You state that Mr. Cochran received his full vacation for the year 1967.

The vacation rights of a City employee are governed by the provisions of the Compensation Plan for City Employes Established for Year 1967 (C.J. 12-19-66, p. 8264); Section G(2)(a) pertains to Vacation Leave, and provides in part as follows: (C.J. 12-19-66, p. 8267)

> "Each salaried or hourly rate employee who occupies a position in the classified service will be guaranteed a vacation with pay of two calendar weeks (10 work days) *after he has completed his first full year of service.*
>
> * * * Each salaried or hourly rate employee who has served the City of (sic) ten years or more shall be guaranteed a vacation of three calendar weeks (15 work days) in each calendar years. * * *" (Emphasis added.)

The above quoted provision makes it crystal clear that vacation pay is due for services performed and not for future services which may never be performed.

We are of the opinion that the provisions of the Compensation Plan for City Employes Established for Year 1967 are controlling and that by reason thereof Mr. Cochran, who is retiring on December 31, 1967 and will not perform any services in 1968, is not entitled to three weeks vacation pay to cover his projected 1968 vacation.

VACATION SALARY OF DECEASED CIVIL SERVICE EMPLOYEE

(Commissioner, Department of Public Works—A. H.—June 17, 1968)

Your recent request for an opinion addressed to Raymond F. Simon, Corporation Counsel, as to whether the widow of a Civil Service employee is entitled to salary in lieu of vacation time earned but unused by reason of the employee's death, has been referrred to the undersigned for consideration and response.

You state that the employee to whom you refer died on May 10, 1968, after having taken a leave of absence on October 1, 1967. You state that his widow maintains she should receive most, if not all, of his 1968 vacation due to the fact that he worked practically the entire year of 1967. You seek our opinion with respect to whether the widow should receive said compensation.

Your letter does not set forth the length of service accrued by the employee; however, we shall assume for the purpose of this opinion that the employee in fact worked the entire year of 1967 except for that period beginning October 1 to the end of the year, based upon the widow's contention which you have set forth without contradiction.

Under the Regulations Governing the Administration of Compensation for Classified Positions (J. Coun. Proc., January 17, 1968, pp. 2168, *et seq.*), the provisions for vacations are contained in Section G(2). Under subsection (a) thereof, the regulations postulate the proposition that vacations are earned in the year of service preceding the vacation time accruing to an employee in the

classified service. The regulations go on to provide, under subsection (b) thereof, that an employee who has been on duty disability and whose time on such disability plus regular working time equals or exceeds six months of service since the date as of which the latest previous vacation allowance was computed shall be granted a vacation as if all time was working time. The disability leave to which you refer in your letter was "ordinary" rather than "duty" disability; however, the policy of granting the full vacation period where disability plus working time exceeds six months would appear to govern an instance where total working time by itself exceeded the six-month period, whether the balance of the year results from disability leaves of either category.

It is therefore our opinion that under subsection (c) thereof, which authorizes payment to a widow of a deceased Civil Service employee the prevailing salary for his unused vacation period, the widow of the employee to whom you refer is entitled to receive the prevailing salary for the unused vacation period accrued by the employee for the entire year of 1967.

The foregoing opinion is in substantial harmony with a previous opinion rendered by this office under virtually the same regulations (24 Op. Corp. Coun. 151, No, 12262).

COMPUTATION OF VACATION RIGHTS OF CIVIL SERVICE

(P. F. D.—R. L. C.—March 19, 1968)

In your letter to this office you state that you were a lineman for the Chicago Transit Authority for a number of years prior to your becoming a Civil Service lineman for the City of Chicago on September 15, 1951. You ask this office to verify your impression of the law permitting credit for the period of CTA employment in computing your vacation rights. I regret to inform you that you are in error.

Vacation policy followed by the City of Chicago is established by Resolution of the City Council passed January 17, 1968. Paragraph (f) of Section G(2) of the Classification and Compensation Plan for City employees states:

> "Any employee of the City of Chicago who has rendered service to the County of Cook, the Chicago Park District, the Chicago Housing Authority, the Chicago Land Clearance Commission or the Forest Preserve District, or the Metropolitan Sanitary District of Greater Chicago, the State of Illinois, the Chicago Board of Education or Board of Junior Colleges District 508 shall have the right to have the period of such service credited and counted for the purpose of computing the number of years of service as an employee of the City for vacation credit, provided that such service has been continuous as defined in this resolution."

Inasmuch as the Chicago Transit Authority is not included in the provisions of this Resolution, your department head is without authority to use the service time with the CTA so as to increase your vacation benefits.

CIVIL SERVICE ELIGIBILITY PRIORITY

(President, Civil Service Commission—A. H.—February 27, 1969)

Your recent request addressed to Raymond F. Simon, Corporation Counsel, for an opinion with respect to registers of eligibles and the merger therewith of names of eligibles taken from subsequent examinations, has been referred to the undersigned for consideration and response.

You describe a situation wherein prior to the exhaustion of an existing register of eligibles resulting from an examination, the Civil Service Commission has caused a second examination to be given. You state that the Commission

presently gives priority of certification to persons taking the earlier examination in the order of rank on that examination and thereafter certifies eligibles from the second list in the order of their respective rank resulting from the second examination. You ask whether there is any reason why the Civil Service Commission could not continue to give examinations for a class of positions and add names to the eligible list in the order of the final averages, rather than the respective standings resulting from each examination. You cite certain language appearing in Sections 10-1-12 and 10-1-14 of the Municipal Code of Illinois (Ill. Rev. Stat. 1967, Ch. 24, Pars. 10-1-12, 10-1-14) as possible authority for such a procedure.

We find no Illinois case authority which directly interprets Sections 10-1-12 and 10-1-14 in circumstances similar to that which you have posited; however, the language of Section 10-1-12 appears to be clear and unambiguous with regard to standing of eligibles upon a register, providing, in part:

> "Such persons shall take rank upon the register as candidates *in the order of their relative excellence* as determined by examination, *without reference to priority of time of examination.*" (Emphasis supplied.)

The California Court of Appeals in *Rodrigue* v. *Rogers,* 4 Cal. App. 257, 87 Pac. 523, construed quite similar language to mean that candidates' names upon a register for appointment for the same classified position must be placed upon the basis of their relative excellence, merging names existing by reason of an earlier examination with names resulting from a subsequent examination, irrespective of when the examinations were given.

Support for the above proposed statutory construction may also be found in the provisions contained within Section 10-1-14 of the Illinois Municipal Code aforesaid, wherein the Civil Service Commission is empowered to strike from a register *names of candidates* after they have remained thereon for more than two years on an individual name basis or as an entire list of names, depending on the circumstances presented (see, *e.g., People ex rel. Walsh* v. *City of Chicago,* 226 Ill. App. 409). The inference to be drawn is that some names, having resulted from an earlier examination, will have "aged" sooner than other names on the register added by subsequent tests results and merged on said list.

The policy of the law would appear to be that an ample reservoir of qualified persons be made available for public service who will be chosen therefor not through the accident of time, but upon their relative excellence. This policy has found expression in Section 8b.1 of the Illinois Personnel Code (Ill. Rev. Stat. 1967, Ch. 127, Par. 63b108b.1), couched in other language, but with a similar result as that proposed, in part, as follows:

> "The Director may, however, in his discretion, continue to receive applications and examine candidates long enough to assure a sufficient number of eligiblies to meet the needs of the service and may add the names of successful candidates to existing eligible lists in accordance with their respective ratings."

To follow the merger procedure suggested by your letter would appear to guarantee the public the services of those persons best qualified for the positions to which they aspire, irrespective of when the examinations for such positions were given.

VETERANS PREFERENCE POINTS FOR CIVIL SERVICE EMPLOYMENT

(Corporation Counsel, City of Decatur—M. S.—March 26, 1968)

This is to acknowledge receipt of your recent letter addressed to Mr. Raymond F. Simon, Corporation Counsel of the City of Chicago, in which you request our policy and interpretation of Chapter 24, Section 10-1-16 of the Illinois

Revised Statutes. To illustrate your question you formulated the following hypothetical situation:

> "A served in the armed forces during the Korean Conflict. In 1956 he successfully completed an examination for a classified position. Because he was a veteran, 5 points were added to his score and he was appointed to the classified position from the eligibility list which was established. Later, in 1960, he being qualified for the same, he took the examination for a supervisory position in his department. Because of the length of his service, if he is entitled thereto under the provisions of 10-1-16, he could receive 2.1 veteran preference points."

You ask whether A is eligible to receive the promotional veteran points or having already received 5 points on original appointment he is precluded from receiving the additional points prescribed for promotional appointment.

It is the policy of the Civil Service Commission of the City of Chicago to allow two preferences, one for original entrance and another on promotional appointment, to the same veteran for the same service.

The second paragraph of Section 10-1-16 which deals with preferences for veterans on promotional appointments is addressed to "Every certified civil service employee." No distinction is made to exclude from this portion of Section 10-1-16, certified civil service employees who have already received veteran preference points on their original entrance for certified employment. The only exclusion to be found is in the fourth paragraph of the section which states in part:

> *"No person* shall receive the preference for a promotional appointment granted by this section after he has received *one promotion* from an eligible list on which he was allowed such preference." (Emphasis Supplied)

As you have noted in your letter, the statute provides two separate methods of computing veterans' preference points: upon original entrance, a flat 5 points is added to the veterans' score regardless of the duration of their service in the armed forces; whereas for promotional appointment, after September 1, 1949, veterans are entitled to seven-tenths of one point for each 6 months or fraction thereof of military service, not to exceed 30 months, which could entitle them to a maximum of 6.1 points.

VETERANS PREFERENCE—PERIOD OF TIME WITHIN WHICH TO FURNISH PROOF

(Personel Director and Secretary, Chicago Civil Service Commission—M. S.—March 5, 1973)

Your recent letter addressed to Mr. Richard L. Curry, Corporation Counsel City of Chicago, wherein you invite comment by this office regarding the proposed changes in Section 4 of Rule III and Section 5 of Rule V of the Commission's Rules concerning the granting of veterans' preference, has been referred to the writer for comment.

You propose an amendment to the aforesaid rules that would provide:

> "Proof of military or moral service by virtue of which an eligible is entitled to claim preference shall be furnished by this affiant as eligible to the Commission within 10 days of the posting of the eligible list."

We agree with the Commission that the proposed amendment would greatly clarify the confusion which now exists concerning the period of time within which an eligible for veterans' preference shall furnish proof of such military service.

This amendment would also facilitate the Commission's responsibility of revising the eligible list to properly reflect veterans preference entitlement within a manageable period of time and in such a manner that every candidate could properly determine his or her final position to the final eligible list.

DEFINITIONS OF "VETERANS OF THE VIET NAM CONFLICT"

(President, Chicago Civil Service Commission—A. H.—September 27, 1967)

Your recent letter, addressed to Raymond F. Simon, Corporation Counsel, requesting an opinion with respect to what definition shall be applied to the phrase "veterans of the Viet Nam conflict" which appears in a recently enacted amendment to Section 10-1-16 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, ch. 24, par. 10-1-16), has been referred to the undersigned for consideration and response. You ask whether veterans of the Armed Forces who did not actually serve in Viet Nam should receive preference and what dates of service should be given preference in relation to said conflict.

The amendment to Section 10-1-16 does not define the phrase "veterans of the Viet Nam conflict" nor does it expressly provide whether by the term "veterans" one need actually have served in Viet Nam, or only have been a member of the Armed Forces during that conflict; nor does it set forth the dates of service which are to be given preference in relation to said conflict.

Turning first to the question of who may be considered a "veteran," we note that the language of the statute, Section 10-1-16, grants preference to:

> "Persons who were engaged in the military or naval service of the United States at any time during the years 1898 through 1907, 1914 through 1919, at any time between September 16, 1940 and July 25, 1947, or at any time during the national emergency between June 25, 1950 and January 31, 1955, and who were honorably discharged therefrom and all persons who were engaged in such military or naval service during any of said years who are now or may hereafter be on inactive or reserve duty in such military or naval service, or were veterans of the Viet Nam conflict. . . ."

The term "veterans of the Viet Nam conflict" is general in nature, as compared with the language which precedes it in determining those persons eligible to receive preference, in that in each instance, said persons are defined as having been ". . . engaged in the military or naval service of the United States . . . ," and also ". . . all persons who were engaged in such military or naval service during any of said years . . . ." Applying the doctrine of *ejusdem generis,* which prescribes that general words in a statute be construed so as to include only things of the same kind as those indicated by specific and particular words which follow (see, *e.g., City of Chicago* v. *Ross,* 257 Ill. 76, 79), it would appear that the word "veterans" should be construed as "persons who were engaged in the military or naval service of the United States . . ." during the "Viet Nam conflict" and who were "honorably discharged therefrom . . . ."

It is also a well established rule of statutory construction that although a statute itself affords the best means of its exposition from which the intent of the General Assembly must be ascertained (see, *e.g., Berwyn Lumber Co.* v. *Korshak,* 34 Ill.2d 320) if there remains a doubt as to the meaning of language contained within the statute, after appropriate consideration thereof, reference may be had not only to the language of the statute, but also to extrinsic matters, such as public documents and records and general facts of common and public knowledge (*Scofield* v. *Board of Education,* 411 Ill. 11) for aid in determining such intent.

The interpretation to which we have previously referred is strengthened when reference is made to other statutes which define "veterans." For example, at the

same legislative session in which Section 10-1-16 of the Illinois Municipal Code was amended, Section 8b of the State of Illinois Personnel Code (Ill. Rev. Stat. 1965, ch. 127, par. 63b108b) was enacted by the General Assembly wherein appropriate preferences in entrance examinations for applicants seeking employment with the State government includes ". . . persons who have been members of the Armed Forces of the United States . . . ." Reference to the United States Code, insofar as "veterans' " benefits are concerned, shows that the term "veteran" has been defined to include ". . . a person who served in the active military, naval or air service, and who was discharged or released therefrom under conditions other than dishonorable" (38 U.S.C.A. 101(2)).

In none of the above-cited definitory language is there a requirement that one need have been on the actual scene of hostilities in order to qualify as a "veteran" of said conflict. From the foregoing, it must be concluded that the amendment to Section 10-1-16 of the Illinois Municipal Code contemplates that the word "veterans" shall include all those persons who actively served in the Armed Forces of the United States during "the Viet Nam confiict," who received honorable discharges, without regard to the actual *situs* of said service.

With respect to the dates of service which are to be given preference in relation to said conflict, the amendment to Section 10-1-16 of the Illinois Municipal Code is also silent. The amendment to Section 8b of the Personnel Code of the State of Illinois grants a veterans preference to persons who have been members of the Armed Forces from "June 27, 1950, until such time as the national 'Veterans Readjustment Act of 1966' is terminated." The foregoing date bears an obvious relationship to military service on and after the Korean conflict (see, *e.g.*, Ill. Rev. Stat. 1965, ch. 126½, par. 57.16), which is clearly broader than the period of the "Viet Nam conflict," and therefore provides no assistance in determining, the date upon which the "Viet Nam conflict" may be deemed to have started. An examination of Section 2 of the Viet Nam Veterans Compensation Act reveals that the first date of service upon which veterans' compensation may be calculated is January 1, 1961, and the date upon which said compensation benefit is no longer available is ". . . such time as Congress declares such persons ineligible for the Viet Nam Service Medal. . . ." (Ill. Rev. Stat. 1965, ch. 126½, par. 57.52). Adherence to the above noted dates would appear to conform as nearly as presently possible to apparent legislative intent and we suggest that said dates be considered by the Civil Service Commission as the dates intended upon which to grant veterans' preferences by the Civil Service Commission.

CIVIL SERVICE WAIVER SYSTEM

(President, Chicago Civil Service Commission—A. H.—November 24, 1967)

Your recent correspondence addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, seeking an opinion with respect to the legality of a proposed Civil Service waiver system, has been referred to the undersigned for consideration and response.

The problem set forth in your letters reveal that, under the present procedures, the vast majority of persons whose names appear on promotional eligible lists are not interested in promotion except in the same department by which they are employed, thereby requiring a cumbersome, time-consuming process of having those employees seeking promotion to secure waivers from all persons whose names appear above theirs on the promotional eligible list. You advise that the Civil Service Commission is thereby obligated to spend a great deal of clerical time in recording those waivers, which may involve 25 or 30 documents to be recorded separately in each case.

You propose a solution to this problem by means of implementing a departmental system which would allow a person eligible for promotion to indicate a department or departments to which he would accept promotional appointment. As long as the waiver would remain in force, the eligible person would not be

considered for certification to any departments other than those to which he would accept appointment, with the proviso that a waiver could be withdrawn at any time during the life of an eligible list. You ask whether such a system would be legal.

Earlier opinions of the Corporation Counsel of the City of Chicago indicated that a waiver of certification cancels itself when the person next on the eligibility list is certified and appointed to the position for which certification is waived. The underlying theory therein stated is that the waiver is *functus officio,* which has as its sole legal purpose the circumstance of having one entitled to present certification and appointment waive or surrender has right thereto, so that the person next on such list may be lawfully certified, but that the waiver thereafter cancelled itself (see, *e.g.,* 18 Op. Corp. Couns., 182, No. 6810). There is nothing in that opinion which indicates the form or substance of the alleged waiver under consideration there; however, it appears that said waiver was construed under Civil Service Rules then in effect so as to result in discharge after one year where the waiver was not withdrawn within one year.

A subsequent opinion recognized that a waiver may also take effect for as long a period of time as one year, particularly under the Rules of the Civil Service Commission, Section 4, Rule IV, which provided that ". . . waivers, whether continuous or otherwise, shall not be permitted for a period longer than one year . . . ." The opinion stated that a waiver for one year is not to be considered in the nature of a resignation at the end of the year if not withdrawn, but that ". . . it is a voluntary relinquishment of a person's right to be certified for the period of a year," after which it expires and it becomes the duty of the Civil Service Commission to reinstate the person to the appropriate eligible list. (23 Op. Corp. Couns., 139, 141, No. 11203.)

The proposition that a waiver may be viable for a specified period of time, including a period as long as one year, was contemplated in *People ex rel. Cibic* v. *Geary,* 318 Ill. App. 231 (Abst. Op.), in which the Court stated, among other things:

> "The result of the examination was to produce the names of 105 persons eligible to appointment to this position [engineer custodian]. All have been certified by the [Civil Service] Commission [of the City of Chicago]. Eleven have waived their right. There is at the present time no name of any individual on the list who is eligible for appointment to this position of engineer custodian, but any one of the 11 who waived may within a year from the time of his certification withdraw his waiver and thus become eligible. Withdrawal may be made by any one of them any day prior to the expiration of one year from the date on which he waived."

It therefore appears that under appropriate circumstances an employee may waive his right to promotion for as long a period of time as he may desire within such rules of the Civil Service Commission as may be in force, with the understanding that upon the expiration of said waiver, the Civil Service Commission must restore his name to the eligible list, if it is still in existence.

From the foregoing, it may be concluded that a departmental waiver system may be established by the Civil Service Commission wherein eligible persons may waive promotion to any department other than the one in which they seek employment, with the proviso that the eligible person be fully and clearly advised of his rights, the nature and effect of the proposed waiver, the option to withdraw said waiver at any time, and the effect of restoration to such eligible list as may be in existence at the time upon the expiration of the waiver.

Section B. SALARIES

RIGHTS OF COMMON-LAW WIFE RE: DECEASED'S PAYCHECKS

(City Comptroller—S. R. D.—October 7, 1970)

We acknowledge receipt of your recent communication in which you state that Lorenzo Fobbs, Payroll No. 1059, died; and that you are holding ten of his pay checks, totaling $2,343.19. You state Mr. Fobbs "had a common-law wife, Selma Clemens, and apparently had several mistresses during his lifetime and that you understand he had seventeen children from the various women." You further state that Miss Clemens has certain documents which, she claims, prove that Mr. Fobbs acknowledged fatherhood of several children. You request our opinion as to whether these documents would be sufficient for you to "release these payroll checks to her."

Section 4 of the Act in Relation to Marriages (Ill. Rev. Stat., 1969, Chap. 89, par. 4) provides in part as follows:

> "However, all marriages commonly known as 'common law marriages' entered into after June 30, 1905 are null and void unless after the contracting and entering into of any such common law marriage a license to marry be first obtained by such parties who have entered into such common law marriage and a marriage be solemnized as provided by this Act in the same manner as is provided for persons who have obtained a license to be joined in marriage and are about to be joined in any such marriage. And any children born to parties who have entered into such common law marriage shall be and are deemed legitimate upon the parents having obtained a license to marry and are married in the manner provided in this Act."

From the foregoing, it might be that Miss Clemens or the children born from her relationship with Hr. Fobbs have no right to the proceeds of his payroll checks.

It is our suggestion that you deliver the payroll checks to the administrator of the Estate of Lorenzo Fobbs, upon presentation by him of a certified copy of the Letters of Administration for the Estate of Lorenzo Fobbs, Deceased. We also suggest that the administrator furnish you with an Inheritance Tax Waiver from the Attorney General of the State of Illinois.

You state that Morton J. Rubin, an attorney with Horwitz Anesi & Ozman, has inquired about this matter. The undersigned has communicated with Mr. Rubin and has suggested that he furnish the documents hereinbefore set forth.

CITY OF CHICAGO AS AGENT FOR FEDERAL RESERVE BANK

(City Comptroller—S. R. D.—January 2, 1969)

We acknowledge receipt of your recent communication requesting our opinion as to whether the City has authority to qualify as an agent of the Federal Reserve Bank for the issuance of United States Savings Bonds purchased by city employees as a result of payroll deductions.

Section 10-4-3 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, chap. 24, par. 10-4-3) authorizes the corporate authorities to withhold and deduct from the compensation of each of its employees who consents thereto, a specified amount each pay period for the purchase of United States Savings Bonds for the benefit of such employee; that the account of each employee shall be kept separate; and

that as often as the individual account of any such employee contains a credit sufficient to purchase a bond of the denomination stated, the withholding officer shall purchase a bond as directed by such employee, and deliver the same to the employee.

Summarizing the foregoing provision, the municipality is authorized to withhold specified amounts from an employee's salary to purchase a United States Savings Bond in the denomination authorized by the employee when a sufficient amount is contained in his account, and deliver the same to him. It nullifies any authority to the municipality to qualify as an agent of the Federal Reserve Bank for the issuance of Savings Bonds.

In light of the foregoing, we are of the opinion that the City of Chicago does not have the authority to qualify as an agent of the Federal Reserve Bank for the issuance of United States Savings Bonds.

PAYCHECKS CASHED ON FORGED ENDORSEMENTS

(City Comptroller—F. V. K.—September 29, 1970)

Your letter addressed to Richard L. Curry, Corporation Counsel of the City of Chicago, has been referred to the undersigned for response. Your letter pertains to certain pay checks issued to Abel Borkhuis, an employee of the City of Chicago, which were cashed on forged endorsements. The pay checks in question were mailed to Mr. Borkhuis but never reached him. The Halsted-Jackson Currency Exchange cashed the checks upon forged endorsements. Since the Halsted-Jackson Currency Exchange has been reluctant to reimburse the City of Chicago you request an opinion as to whether Abel Borkhuis should be issued new checks before the City of Chicago is reimbursed by the aforementioned currency exchange.

In order for the City of Chicago to be discharged from its obligation to pay Abel Borkhuis for his employment there would either have to be a payment or satisfaction, or tender of payment for his services. Chapter 26, par. 3-409 (1) of the Illinois Revised Statutes, 1969, states in part:

> "(1) A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment. . . ."

Illinois Courts have held that the delivery of a check is not equivalent to a transfer of money. *United Boiler and Foundry Company* vs. *Achermann-Quigley Printing Company*, 236 Ill. App. 111 (1925). In order for the City of Chicago to be released of its obligation to pay Mr. Borkhuis for his employment his pay checks would not only have to be received by him but accepted by the City of Chicago. Since the City of Chicago is liable to Abel Borkhuis for his services new pay checks should be issued to him to cover the amounts of the lost pay checks notwithstanding the facts that the City of Chicago has not been reimbursed to date by the Halsted-Jackson Currency Exchange.

The City of Chicago has a cause of action against the Halsted-Jackson Currency Exchange. The ownership of the said pay checks is in the City of Chicago since they never reached the payee, Abel Borkhuis. Chapter 26, Section 3-419 (1) (c) states:

> "(1) An instrument is converted when . . . .
>
> (c) it is paid on a forged indorsement."

Since the paychecks never reached Abel Borkhuis it would follow that the Halsted-Jackson Currency Exchange honored and paid the said instruments on the basis of forged endorsements and would therefore be responsible to the City of Chicago, their maker, for the conversion of the instruments. See *Gustin-Bacon Mfg. Co.* vs. *First National Bank of Englewood* 306 Ill. 179 (1922), *First National Bank of Chicago* vs. *Pease* 168 Ill. 40 (1897).

CITY PAYMENT OF EMPLOYEES' HOSPITALIZATION AS TAXABLE INCOME

(City Comptroller—R. L. C.—January 29, 1971)

Beginning January 1, 1971, the City of Chicago has undertaken as a fringe benefit to employees the entire payment of hospitalization insurance for the employee and his family. In this regard, you have asked this office whether or not this benefit is to be included as "taxable income" to the employee.

Section 106 of the Revenue Code of 1954 provides as follows:

> "Gross income does not include contributions by the employer to accident or health plans for compensation (through insurance or otherwise) to his employees for personal injuries or sickness."

Regulations of the Internal Revenue Service are consistent with the above-quoted section of the Code and it is therefore clear that this benefit is not "taxable income to the employees."

SALARY OF CITY FIREMAN KILLED WHILE ON DUTY

(J. T. M., City Comptroller—D. P.—July 30, 1968)

Mr. Otto Loser, City Comptroller, has requested this office to advise you as to whether the minor son of the late Charles D. Bottger, a city fireman killed while on duty, is entitled to his father's salary for a period of one year following the father's death. According to Mr. Loser's letter, the minor is in the custody of his mother, who was formerly married to Charles D. Bottger.

The Municipal Code of Chicago, Chapter 12, section 12-54, continues the salary of city firemen

> ". . . killed in the line of duty . . . for a period of one year commencing from the date of the death of the deceased member of the fire department, and shall be paid . . . in the absence of a widow, to the guardian or person standing in loco parentis of dependent minor children . . . ."

Therefore, we see no obstacle to the disbursement of the proper funds according to the procedures of the Department of Finance, whenever that department is satisfied that all of the controlling facts have been established, that is, the death of the fireman in line of duty, the lack of a widow, and the existence of a minor dependent.

LIABILITY OF THE CITY FOR AN EMPLOYEE'S PAYCHECK

(City Comptroller—F. V. K.—May 16, 1969)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for response. You refer to a City of Chicago paycheck which was stolen from an employee and later cashed by one who forged the employee's endorsement. Upon presentment to the City of Chicago by a subsequent endorsee the paycheck was honored and paid. You request an opinion as to the liability of the City of Chicago to the employee on the paycheck.

The paychecks of the City of Chicago are in the form of drafts. Under these drafts the City of Chicago stands in the position of both drawer and drawee while the employees are payees. These drafts, being negotiable instruments, are

governed by the Illinois Uniform Commercial Code, found at Chapter 26 of the Illinois Revised Statutes (1967).

In the situation presented above the City of Chicago in its position as drawee was presented the paycheck by a subsequent endorsee, who was then paid the face amount of the instrument. Chapter 26, section 3-603, entitled Payment or Satisfaction, states, in part:

> "(1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This subsection does not, however, result in the discharge of the liability
>
> (a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; . . ."

There is no evidence showing that the party presenting the check to the City was other than a holder in due course. Upon payment in full to the holder in due course, the City discharged any liability it had under the instrument. The aforementioned principle would apply no matter how or where the employee lost possession of the instrument so long as the employee originally had possession.

While the City of Chicago is not liable to the payee because of its discharge by payment, the payee may still have a remedy to regain the amount of the paycheck. Chapter 26, section 3-419 states, in part:

> "(1) an instrument is converted when . . . .
>
> (c) it is paid on a forged endorsement.
>
> (2) . . . In any . . . action under subsection (1) the measure of liability is presumed to be the face amount of the instrument."

Thus the payee may have a cause of action in conversion against the party who honored and paid the draft on the forged endorsement.

Therefore the employee should be notified that the City is absolved of any liability on the paycheck and that the said employee should seek the advice of an attorney as to a possible remedy such as the one pointed out above.

EMPLOYMENT BY CITY OF POLICEMEN/FIREMEN RECEIVING STATE PENSIONS

(Chief Budget Examiner, Committee on Finance—A. H.—October 17, 1967)

You have requested an opinion from the Law Department with respect to whether the City is authorized to employ a policeman or fireman receiving ordinary or disability pension under State statutes. You ask further what seniority status such persons would have for vacation purposes and pay schedules under the City's classification and pay plan, if they are so employable. We shall assume that the employment by the City to which you refer is other than with the Police and Fire Departments with which said persons were formerly employed.

We find no prohibition against the employment by the City of policemen or firemen receiving ordinary or disability pensions; however, the event of their re-employment by the City of Chicago may result in certain consequences from the standpoint of their pensions, depending upon the factual situation presented.

(See, *e.g.*, Ill. Rev. Stat. 1965, ch. 108½, pars. 5-157, 5-159, 6-154, 6-156; *People ex rel. Luthardt* v. *Retirement Board*, 273 Ill. App. 387; *Kelly* v. *Retirement Board*, 292 Ill. App. 390; 22 Op. Corp. Couns. 213; 23 Op. Corp. Couns. 184; 24 Op. Corp. Couns. 175, 189.)

With respect to the seniority status of retired policemen and firemen, insofar as vacation and pay schedules affecting their new positions are concerned, this office has heretofore taken the position that an employee, who has completed a term of service in a City department, has resigned from said service, and has accepted an annuity therefor, must be deemed to have entered upon entirely new employment when he accepts a new City job and such matters as his vacation rights should be calculated only upon the service he has rendered in his new position. To grant him a vacation period, for example, based upon service which has been completed and for which he is receiving an annuity, would, in effect, increase the annuity he is receiving, contrary to the Constitution of the State of Illinois (1870), Article IV, § 19. (See 24 Op. Corp. Couns. 149.) The same reasoning applies to pay schedules.

We are, therefore, of the opinion that the City of Chicago may employ policemen or firemen receiving ordinary or disability pensions, who, in fairness to them, should be advised that there may be resultant consequences affecting their pensions. We are of the further opinion that such employees should be deemed to have entered upon new service when re-employed by the City in a department other than the Police or Fire Department with which said persons were formerly employed, and should receive vacations and salaries commensurate with actual service rendered in their new positions.

ACCRUED SICK LEAVE AND VACATIONS

(Commissioner of Health—A. H.—September 6, 1967)

Your recent letter and memorandum addressed to the Honorable Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response.

You ask what position your Department should take in regard to carrying on the Department payroll Dr. Jeremiah Stamler and Mrs. Yolanda Hall in view of a resolution adopted on July 20, 1967, by the Chicago Board of Health, a copy of which was enclosed with your letter. You also ask what may be done in the case of Dr. Stamler with respect to 70 days of accrued sick leave and two weeks vacation.

An examination of the copy of the resolution to which you refer contains the following language:

> "In accordance with Chicago municipal policy, our employees, Dr. Jeremiah Stamler and Mrs. Yolanda Hall, have been placed on inactive status as far as their City job status is concerned. This condition will continue until and unless the matter for which they have been indicted has been judicially settled, and the salaries ordinarily paid them during that interim will be held in abeyance."

The second paragraph of the resolution indicates that the term "inactive status" should be understood as implying ". . . withdrawal from active duty by mutual consent." Therefore, it is our opinion that the Board of Health should refrain from carrying on its payroll the two individuals above named. ". . . until and unless the matter for which they have been indicted has been judicially settled."

With respect to Dr. Stamler's 70 days of accrued sick leave and two weeks vacation, reference must be made to the Compensation Plan for City Employees Established for the Year 1967, particularly paragraph G., Holidays, Vacations and Sick Leave, etc. (J. Coun. Proceed. p. 8267, December 19, 1966). Subparagraph (4) thereof provides that sick leave credit earned by an employee subsequent to

January 1, 1959, shall accrue to a maximum of 120 work days at the rate of 12 days per year, less days of sick leave used by the employee. Also under subparagraph (4), severance of employment prior to making use of all or any part of such sick leave terminates all rights for compensation hereunder. Therefore, Dr. Stamler could be legally paid for such sick leave accumulated under the foregoing provisions up to and including July 20, 1967, the date of the resolution adopted at the special meeting of the Chicago Board of Health, in which ". . . withdrawal from active duty by mutual consent" took place.

Regarding Dr. Stamler's vacation leave, under subparagraph (2) (c), of paragraph G hereinabove referred to, where an employee has not taken his vacation by reason of separation from service, other than by discharge for cause, he shall be entitled to receive his prevailing salary for such unused vacation period. Therefore, Dr. Stamler can be legally paid for such accrued vacation period as has been unused to and including July 20, 1967.

COMPENSATION FOR WORK AFTER 6 P.M.

(Executive Director, Commission on Youth Welfare—D. P.—March 8, 1968)

You have asked this office to advise you as to whether the staff of the Commission on Youth Welfare is "protected by compensation if they work after 6 P.M."

Unfortunately your memordandum does not supply sufficient information for this office to provide a precise answer. In general it may be said that any agency that is covered by compensation during regular city hours would be similarly covered after 6 P.M. during regular course of employment. Whether an agency is covered at all is, of course, dependent upon such matters as whether it is supported with municipal funds, and whether it is under the supervision and control of the City of Chicago.

Should a more detailed response be required, it is suggested that the situation be discussed with Michael Artery, Assistant Corporation Counsel, 609 City Hall. With more information, Mr. Artery will be able to advise you properly.

REVIEW OF WORK RECORD AND EFFICIENCY RATING

(City Clerk—F. G. S.—May 30, 1973)

Your letter of May 18, 1973 addressed to Richard L. Curry, Corporation Counsel, together with a copy of a letter addressed to you from Anna Fornega, Head Clerk, has been referred to the undersigned for attention and reply. In your letter you request that we advise you regarding the "legal significance" of Anna Fornega's request for a meeting with you to review her work record and efficiency in light of the recent efficiency rating of 68.2 given her by her superior Mr. O'Donnell, which she believes to be unjustified and which has resulted in holding up a salary increase which she claims was due April 1, 1973.

This is to advise you that in accordance with Chicago Civil Service Regulations and procedures Anna Fornega is entitled to and should be given the opportunity for an independent review of her efficiency rating by yourself including an opportunity to present personally to you at an appropriate meeting, any information, material or evidence in support of her claim.

There is no provision for, nor is Anna Fornega entitled to have present at any meeting to review her efficiency rating her union representative or her attorney.

After the meeting and review of all matters relating to Anna Fornega's efficiency rating by yourself, Anna Fornega should be advised of your decision in writing.

CHAPTER III—ANNUITIES AND BENEFITS FOR CITY EMPLOYEES

Section A. MUNICIPAL EMPLOYEE'S ANNUITY AND BENEFIT FUND

DISABILITY PAYMENTS

(Executive Director, Chicago Alcoholic Treatment Center—S. R. D.—July 9, 1970)

We acknowledge receipt of your recent communication requesting our opinion as to whether Frank A. Luszczek, Community Health Aide, Title Code Number 3748, who started employment on August 1, 1969 is entitled to disability payments. You state that during a routine checkup on May 4, 1970 it was revealed that Mr. Luszczek contracted tuberculosis. He was admitted to the Illinois State Tuberculosis Sanitarium on May 22, 1970.

Under Section 8-113 of the Municipal Employees' Officers' and Officials' Annuity and Benefit Fund Cities over 500,000 Inhabitants Act (Ill. Rev. Stat., 1969, Chap. 108½, Par. 8-113) provides that before an employee is entitled to disability benefits (Section 8-161) he must be an employee for not less than 12 calendar months. Mr. Luszczek started employment on August 1, 1969 and contracted tuberculosis prior to May 4, 1970 and therefore, has been a City employee for less than 12 calendar months.

In light of the foregoing, we are of the opinion that Mr. Luszczek, is not entitled to any disability benefit.

AUTHORITY OF RETIREMENT BOARD TO REQUIRE PARTICIPATION IN A MAJOR MEDICAL PLAN

(Executive Secretary, Municipal Employees' Annuity and Benefit Fund—P. M. S.—May 18, 1973)

We acknowledge receipt of your letter requesting our opinion with respect to whether or not the Retirement Board has authority to require certain annuitants of your Fund to participate in a Major Medical Plan, and the same has been assigned to the writer for consideration and response.

Your letter points out that of the approximate 1600 annuitants involved, slightly over 60% have expressed a desire to participate in such a plan, and the others have either expressed their desire not to participate or have expressed no preference on this issue. Your letter further points out that the underwriter of the proposed plan requires that all of the annuitants participate in this program before they will underwrite a program for any annuitant.

We are in agreement with your viewpoint that Section 8-244 of Article 8 of the Illinois Pension Code is the specific statute involved with respect to answering the question raised in your communication. This Section provides, in part, as follows:

> "No annuitant, pensioner, or other beneficiary shall have any right to transfer or assign his annuity or disability benefit or any part thereof by way of mortgage or otherwise, except that an annuitant or pensioner who *elects or has elected* to participate in a non-profit group hospital care plan or group medical surgical plan *may* with the approval of the board and in conformity with its regulations *authorize* the board to withhold from the

pension or annuity the current premium for such coverage and pay such premium to the organization underwriting such plan; . . ." (Emphasis added).

The Smith-Hurd Illinois Annotated Statutes do not cite any cases wherein a Court of Review has interpreted the above provisions of Section 8-244. It is our opinion, however, that the General Assembly clearly expressed its legislative intent on the issue under consideration by its use of the words that we emphasized in the above noted provision of Section 8-244. Blacks Law Dictionary, Fourth Edition, defines the word, "election" as "the act of choosing or selecting one or more from a greater number of persons, things, courses, or rights. The choice of an alternative." It also defines the word "authorize" as to "empower; to give a right or authority to act. To permit a thing to be done in the future." These definitions are patently the common and accepted meaning of these words.

It is our opinion, therefore, that the Retirement Board does not have authority under Section 8-244 to require an annuitant to participate in a group medical surgical plan or hospital care plan. Accordingly, it is also our opinion that the Board does not have authority to make any such premium deductions from an annuity until such time as the annuitant elects to become a member of such a plan and authorizes the Retirement Board to make the designated premium deduction.

CONSOLIDATION OF MUNICIPAL AND HOUSE OF CORRECTION EMPLOYEES' ANNUITY AND BENEFIT FUNDS

(City Comptroller, M. C. H.—October 7, 1968)

This is to acknowledge receipt of your letter to this office in which you state that the House of Correction Commissary is operated by the House of Correction Pension Fund and that said Pension Fund, after January 1, 1969 will be taken over by the Municipal Employees Annuity Benefit Fund of Chicago in accordance with current legislation.

Please be advised that I have read Senate Bills 1787 and 1788 and find that said Bills passed in July, 1968 amend Section 19-101 of Illinois Pension Code (Ill. Rev. Stat. 1967, Ch. 108½, par. 19-101) by consolidating the House of Correction Pension Fund with the Municipal Employees Annuity and Benefit Fund and by providing for the transfer of all moneys, securities, assets and records of the Commissary by the Board of Trustees to the Municipal Employees Annuity and Benefit Fund, as of January 1, 1969.

It is our opinion that in view of the consolidation of the Pension Funds, the Board of Inspectors of the House of Correction may continue with the Commissary operation under Sections 11-4-2 and 11-4-4 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, Ch. 24, pars. 11-4-2, 11-4-4), and the proceeds of sales from the said Commissary may become revenue of the Corporate Fund.

EFFECT OF RE-ELECTION ON RETIREMENT STATUS

(Municipal Employees' Annuity and Benefit Fund—T. A. McG.—September 6, 1967)

In response to your request for an opinion concerning Alderman Joseph J. Krska, the following is submitted:

Your letter points out that Alderman Krska made application for membership in your Fund subsequent to being elected Alderman in 1959, and he has been a participant and contributor since such date.

Your letter further points out that Alderman Krska was a candidate for reelection and inquired whether he might be eligible to apply for and receive annuity from the Fund at the end of his present term, even though he is reelected and not have further salary deductions for the purpose of this Fund made at the end of his present term. The Alderman further inquired if he could then apply for and receive annuity even if he were reelected and continued to serve as Alderman.

We are of the opinion that Alderman Joseph J. Krska, if reelected and if he continues to serve as Alderman in the City Council, would not have retired and would not have become separated from his position and, therefore, would not be entitled to an annuity.

EFFECT OF REENTRANCE INTO SERVICE

(Municipal Employees' Annuity and Benefit Fund—T. A. McG.—March 15, 1968)

In response to your request for an opinion concerning SUSAN F. HAHN, who has requested a refund of the amounts deducted from her salary for the purposes of the Municipal Employees' Annuity And Benefit Fund of Chicago, while she was employed under a Civil Service certification as research assistant in the Health Department of the City of Chicago, the following is submitted.

Your letter states the Susan Hahn was certified to the position of research assistant on January 1, 1967, and that she resigned from this position on September 8, 1967. Your records further indicate that Miss Hahn entered service as a temporary employee with the Chicago Committee on Urban Opportunity within thirty days of her resignation from the Health Department.

Susan Hahn automatically became a contributor to the Fund on her certification as research assistant and on her resignation she applied for refund of her contributions to the Fund.

The question at issue is whether Susan Hahn is entitled to a refund or is she estopped from this request because she immediately reentered the service of the City in another capacity, temporary in appointment.

Chapter 108½, Section 8-121 of the Illinois Revised Statutes reads:

> "Withdrawal from service" or "withdrawal":
>
> Discharge or resignation of an employee.
>
> For the purpose of improving sums to the credit of municipal employees for annuity purposes at the 3%, 3½% or 4% per annum interest rate herein provided, re-entrance into service within 12 months after withdrawal from service by persons who have not received a refund under this Article shall be considered continuation in service; and for refund purposes a withdrawal from service shall not be final until 30 days after the effective date of the withdrawal. 1963, March 18, Laws 1963, p . . ., S.B. No. 72, Sec. 8-121.

Chapter 108½, Section 8-113, defines a Municipal employee, employee, contributor or participant, and the issue is whether Mrs. Hahn is taken out of the category of one who reenters service within thirty days after resignation. Mrs. Hahn claims that she is not a Municipal employee or employee as set out in Section 8-113, inasmuch as her temporary appointment with the Chicago Committee On Urban Opportunity requires that she file a written application with the Board while in the service in order to be included as a participant in the Fund.

Chapter 108½, Section 8-228, *Transfers within service,* reads:

> Whenever an employee is transferred or assigned from one position in the service of the employer to another position in such service, he shall not be involuntarily removed from membership in this fund, but may continue to participate as a contributor until by virtue of such other position he becomes a participant in another public pension fund for the benefit of employees of the employer. 1963, March 18, Laws 1963, p. . ., S.B. No. 72, Sec. 8-228.

From an analysis of the applicable sections of the Statute, it is our opinion that upon the resignation of Mrs. Hahn from her Civil Service status as research assistant in the Health Department, she then severed herself from being a participant in the Fund. The fact that Mrs. Hahn took another position within thirty days with the Chicago Committee On Urban Opportunity does not estop her from resigning from the Fund after she severed herself as a Civil Service employee with the City of Chicago. Certainly, Mrs. Hahn could resign as a Civil Service employee and request severance from the Fund and, on taking the second position, the duty was upon her to then request an application for membership in the Fund.

It would, therefore, appear that Mrs. Hahn is entitled to a refund based on her severance from her Civil Service status with the City of Chicago.

INSURANCE PLAN FOR CITY EMPLOYEES

(Administrative Assistant to the Mayor—G. F. H.—November 3, 1972)

This is in response to your inquiry regarding a letter which contended that the City of Chicago's insurance plan discriminates against women by providing unequal survivor benefits.

At present the City's various pension or annuity plans are established and operated pursuant to State statute. Under the existing statutes, all employees covered by such plans are required to contribute a certain percentage of their salaries to an age and service annuity fund. Then, all male employees are required to contribute an additional amount for widow's annuity. (See, for example, Sections 174 and 182 of the Municipal Employees', Officers', and Officials' Annuity and Benefit Fund, Ill. Rev. Stat. ch. 108½, pars. 174, 182.)

Although the present statutory annuity plans do not contain any provisions whereby a female employee may contribute an additional percentage of her salary and thereby secure an annuity for a surviving spouse, this office has been informed that this absence of a "widowers' annuity" has been brought to the attention of some members of the state legislature, which is the body that can effect the changes necessary to correct such apparent inequities.

ANNUITY CREDIT FOR EMPLOYEES FOR PRIOR SERVICE TO THE CHICAGO RAPID TRANSIT COMPANY

(Municipal Employees' Annuity and Benefit Fund—P. M. S.—March 6, 1973)

Pursuant to you request, our office has reviewed the legal question of whether or not members of the Municipal Employees' Annuity and Benefit Fund of Chicago may contribute to said Fund for prior service rendered by them to the Chicago Rapid Transit Company, in order to receive credit for annuity purposes, for this service in said Fund. It is our understanding that based upon an advisory

opinion previously rendered by our office, several members of your Fund have deposited monies with you in order to obtain this credit pending an official opinion from our office with respect to the authority of the Board of Trustees to grant this credit.

The Municipal Employees' Annuity and Benefit Fund of Chicago was created by the General Assembly and Article 8 of Chapter 108½ of the Illinois Revised Statutes governs its operation. Section 8-230.1 thereof provides, in part, as follows:

> "Any employee in the service, after having made contributions covering a period of ten or more years to the Annuity and Benefit Fund herein provided for, may elect to pay for and receive credit for all annuity purposes for service theretofore rendered by him to the Chicago Transit Authority created by the 'Metropolitan Transit Authority Act' . . ."

The above noted section clearly authorizes members of the Fund to receive credit for annuity purposes upon making the required contribution for service rendered by them to the Chicago Transit Authority, the successor of the Chicago Rapid Transit Company. It does not, however, contain any provision for this privilege being extended for service rendered to any transit company that existed prior to the creation of the Chicago Transit Authority by the Metropolitan Transit Authority Act.

Article 22, Section 101, of Chapter 108½, of the Illinois Revised Statutes, provides that the Chicago Transit Authority shall establish and maintain a financially sound pension and retirement system for its employees. Pursuant to this legislative authority, the Chicago Transit Board has established the Retirement Plan for Chicago Transit Authority Employees. Under this Plan, Chicago Transit Authority employees are entitled to receive credit for retirement purposes for past service. Section 3.5 of the Plan, defines "past service" as follows:

> " 'Past Service' shall mean the continuous service with the Authority, or any of its predecessor public utilities, rendered prior to the effective date of this Plan."

While it is quite clear that members of the Retirement Plan for Chicago Transit Authority employees are entitled to credit for retirement purposes for service rendered to the Chicago Rapid Transit Company, it is our opinion that members of the Municipal Employees' Annuity and Benefit Fund of Chicago are not entitled to this credit.

The legislative acts that created and control these two retirement systems are separate and distinct. In view of the fact that Article 8 of the Pension Code regulates the Municipal Employees' Annuity and Benefit Fund, it is necessary to find therein the authority for any action taken by the Board of Trustees. Section 8-230.1 is specifically directed to the legal question under consideration and only makes provision for a member of the Municipal Employees' Annuity and Benefit Fund to receive credit for annuity purposes for "service theretofore rendered by him to the Chicago Transit Authority." Neither this section nor any other section of Article 8 provides for the granting of credit for annuity purposes for service rendered to any predecessor of the Chicago Transit Authority.

It is our opinion, therefore, that since there is no legislative authority for the Board of Trustees to grant credit for annuity purposes for service rendered to the Chicago Rapid Transit Company, any monies heretofore deposited with the Municipal Employees' Annuity and Benefit Fund of Chicago for this purpose should be promptly refunded.

ASSIGNMENT OF REFUND

(Executive Secretary, Municipal Employees' Annuity and Benefit Fund —P. M. S.—January 22, 1973)

We are in receipt of your request for an opinion with respect to whether or not your Fund should honor a Power of Attorney given by Geraldine B. Lewis, to the Chicago Municipal Employees' Credit Union, and the same has been assigned to the undersigned for consideration and response.

Our understanding of the facts in this matters is as follows: Mrs. Lewis, while a contributing member of your Fund due to employment with the Board of Education as a janitress, borrowed a sum of money from the Chicago Municipal Employees' Credit Union. She thereafter filed a bankruptcy petition in the Federal Court and listed in her petition the Municipal Employees' Society of Chicago as a creditor for a money loan, but she did not list the Chicago Municipal Employees' Credit Union as a creditor. That while these two organizations have the same mailing address and telephone number, they are separate private corporations.

A restraining order was issued to the Municipal Employees' Society of Chicago and in April of 1971 the Court entered an order releasing her from her dischargeable debts and restraining the named creditors from employing any process to collect said debts. Mrs Lewis resigned from her civil service position in May of 1971, and in November of 1971 applied to your Fund for a refund of her accumulated annuity contributions. The Chicago Municipal Employees' Credit Union has submitted to you a Power of Attorney from Mrs. Lewis authorizing you to pay them the outstanding balance on her loan. The refund totals approximately $2,300.00, and the debt in question is about $300.00.

To answer this question, it is necessary to consider various aspects of the law with respect to bankruptcy. In bankruptcy proceedings effect will be given to state laws providing for the exemption of certain assets of the bankrupt such as homestead, pensions, annuities, and life insurance policies, provided the particular property claimed as exempt from the reach of creditors is actually exempt within such laws. Corpus Juris Secundum, Volume 8B, Section 498.

Article 8 of Chapter 108½ of the Illinois Revised Statutes governs the operation of your Fund and Section 244 thereof provides, in part, as follows:

> "All annuities, pensions, and disability benefits granted under this Article, shall be exempt from attachment or garnishment process and shall not be seized, taken, subjected to, detained, or levied upon by virtue of any execution, or any process or proceeding whatsoever issued out of or by any court in this State, for the payment and satisfaction in whole or in part of any debt, damage, claim, demand, or judgment against any annuitant, pensioner, or other beneficiary hereunder.
>
> "No annuitant, pensioner, or other beneficiary shall have any right to transfer or assign his annuity or disability benefit or any part thereof by way of mortgage or otherwise. . . ."

It is clear from the above noted statute that creditors of a member of the Fund cannot obtain satisfaction of those debts from the Fund out of annuity or disability payments being made to this member. The statute precludes this even if a member were to consent and request that it be done.

It is our opinion that payments made into the Fund by a presently contributing member would likewise qualify for this exemption. This opinion is based on the obvious legislative intent behind this legislation, and the fact that Illinois Courts have refused to compel debtors to obtain the accrued cash surrender value of life insurance policies for the benefit of creditors. *Fidelity Coal Co.* v. *Diamond,* 322 Ill. App. 229. It is our opinion, therefore, that at the time Mrs. Lewis

went through bankruptcy the contributions she had made to the Fund qualified to be claimed as exempt property.

Title II, Section 35 of the United States Code Annotated provides, in part, as follows:

> "(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as
>
> "(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, *unless such creditor had notice or actual knowledge of the proceedings in bankruptcy;*"

Actual knowledge is often a very difficult element for someone to prove. However, in view of the evidently close association between the Chicago Municipal Employees' Credit Union and the Municipal Employees' Society of Chicago, the fact that they share the same offices and telephone number, and the fact that the Chicago Municipal Employees' Credit Union submitted the bankruptcy restraining order and order of discharge to you, along with the Power of Attorney, strongly indicates to the undersigned that the Chicago Municipal Employees' Credit Union did have actual knowledge of the bankruptcy proceedings of Mrs. Lewis and that this debt was therefore discharged.

It is not entirely clear to the undersigned when Mrs. Lewis gave the Power of Attorney to the Chicago Municipal Employees' Credit Union. Strictly speaking, a discharge in bankruptcy does not constitute payment, nor does it cancel or extinguish the bankrupt's debt. The debt remains as an unenforceable moral obligation. The discharge does, however, bar any remedy for the enforcement or collection by legal proceedings of the debt. A debtor discharged in bankruptcy may revive or create a new obligation on a discharged debt by promising to pay this debt provided that the new promise is positive and unambiguous, voluntarily made, and is not tainted by fraud or illegality. (Corpus Juris Secundum, Volume 8B, Sections 559 and 583).

In the case of Wiedemeyer V. Vivier and Municipal Employees' Annuity and Benefit Fund of Chicago, 287 Ill. App. 628 (Abst), the Court found that the only interest that a party had in the Fund was to refund. The Court therein stated (p. 4, Abst): "Any refund due her was her property. She could withdraw it, assign it or do with it as she saw fit." It is our opinion, therefore, that in a proper case Section 8-244, Chapter 108½ of the Illinois Revised Statues would not, in itself, prohibit you from honoring valid assignments when issuing refunds at the request of the contributor.

In answer to your basic question, it is our opinion that you could honor the assignment Mrs. Lewis gave with respect to the refund due her provided she voluntarily gave this assignment after her bankruptcy proceedings.

ANNUITY AND BENEFIT FUND REFUNDS FOR DEPARTMENT OF CORRECTIONS EMPLOYEES

(Municipal Employees' Annuity and Benefit Fund—T. A. McG.—February 10, 1970)

In your letter of January 16, 1970, you ask whether the Municipal Employees' Annuity and Benefit Fund of Chicago may grant and make payment of refunds to applicants who were Civil Service employees of the House of Correction and were participants in the Municipal Employee' Annuity and Benefit Fund of Chicago, who are now employees of the County of Cook as a result of legislation passed by the 76th General Assembly creating a Department of Corrections within the office of Sheriff in counties with a population of more than one million.

In said letter you state that as a result of this legislation, the House of Correction of the City of Chicago came under the jurisdiction of the County of Cook,

Illinois. You further state that Civil Service Employees of the House of Correction were participants of the Municipal Fund and deductions from salaries, for the purpose of the Fund, were last taken as of December 31, 1969.

Your letter further states that many of these transferred former participants have now made application for refund of salary deductions from the Municipal Employees' Annuity and Benefit Fund of Chicago.

Senate Bill 32 passed on June 30, 1969, and approved by the Governor on July 18, 1969, created a Department of Corrections within the office of Sheriff in Counties with a population of more than one million and provides (Section 13), in part, that:

> "All employees are subject to 'An Act in relation to County Police Departments in certain counties, creating a County Police Department Merit Board and defining its powers and duties', approved August 5, 1963, as now or hereafter amended."

The County Police Departments Act (Ill. Rev. Stats. 1967, Chap. 125, par. 51), provides that "the Sheriff in each county having more than one million inhabitants shall maintain a division to be known as the County Police Department and to consist of such deputy sheriffs charged with the duty of law enforcement in such county as may be selected as hereinafter provided."

Section 2-108 of the County Employees' and Officers Annuity and Benefit Fund—counties over 500,000 Inhabitants Act (Ill. Rev. Stats. 1967, Chap. 108½, par. 9-108) defines an employee to include "a person employed in any position under the County Police Merit Board as a deputy sheriff in the County Police Department."

The County Employees' and Officers Annuity and Benefit Fund—Counties over 500,000 Inhabitants Act (Ill. Rev. Stats. 1967, Chap. 108½, par. 9-223) and the Municipal Employees Officers' and Officials' Annuity and Benefit Fund—cities over 500,000 Inhabitants Act (Ill. Rev. Stats. 1967, Chap. 108½, par. 8-236) are both subject to the provisions of the Retirement Systems Reciprocal Act.

Section 20-101, of the Retirement Systems Reciprocal Act (Ill. Rev. Stats. 1967, Chap. 108½, par. 20-101) provides in part, as follows:

> "There is an established plan for the continuity and preservation of pension credit, in accordance with the provisions hereof, in the case of employees transferring employment from one governmental unit to another. The purpose of this plan is to assure full and continuous pension credit for all service in public employment which is covered by a retirement system.
>
> "The acceptance of the provisions of this Article shall be optional with the employee, or, in the event of his death, with his survivor; * * *"

Section 20-109 of the Retirement Systems Reciprocal Act provides, in part, as follows:

> "If, by operation of law, a function of a governmental unit is transferred in whole or in part to another governmental unit, and employees are transferred, as a class, to such other governmental unit, the acquired credits and equities of those employees in those participating systems covering both governmental units shall be considered as pension credits even though the credits and equities in each system are less than 1 year."

Section 20-118 of the Retirement Systems Reciprocals Act provides, in part, as follows:

> "Any employee who shall have waived by the acceptance of a refund, his pension credit in any participating system, may have his pension credit reinstated by repayment of the refund, including interest from the date of refund to the date of repayment, provided (1) the system is authorized by law to receive the repayment, and (2) the employee has completed at least

2 years of service under the participating system subsequent to the date of last refund."

In P. A. 76-1574, passed in the 1969 regular session of the Legislature under Senate Bill 1028, provides under Section 9, 134.1 as follows:

"In the case of employees who were contributors to and participants as of December 31, 1968, in a House of Correction Employees' Pension Fund, who, by virtue of group transfer on January 1, 1969, became participants in Municipal Employees' Annuity and Benefit Fund under Article 8 of this Code, and who, because of further group or class transfer become participants of the Fund created under Article 9 of this Code, Section 8-136.2 of this Code preserving certain minimum annuity rights for certain house of correction employees and their widows is made applicable to such employees so transferred to this Fund, and such Section is made part of this Article 9 so that such transferred employees are guaranteed such rights under the Fund created by this Article 9 of the Illinois Pension Code as outlined in Section 8-136.12 of this Code."

It is apparent that none of the provisions of the County Police Departments Act, the County Employees' and Officers' Annuity and Benefit Fund—counties over 500,000 Inhabitants Act, or the Retirement Systems Reciprocal Act prohibit the application of the refund provisions of the Municipal Employees' Officers and Officials' Annuity and Benefit Fund—Cities over 500,000 Inhabitants Act to the situation under discussion.

Section 8-168 of the Municipal Employees' officers' and Officials Annuity and Benefit Fund-Cities over 500,000 Inhabitants Act (Ill. Rev. Stats. 1967, Chap. 108½, par. 8-108) provides, in part as follows:

1. "An employee, without regard to length of service, who withdraws before age 55, and any employee with less than 10 years of service who withdraws before age 60, shall be entitled to a refund of the accumulated sums to his credit, as of the date of withdrawal, for age and service annuity and widow's annuity from amounts contributed by him, including interest credited and including amounts contributed for him for age and service and widow's annuity purposes by the city while receiving duty disability benefits. If he is a present employee he shall also be entitled to a refund of the accumulations from any sums contributed by him, and applied to any municipal pension fund superseded by this fund.

2. "Upon receipt of the refund, the employee surrenders and forfeits all rights to any annuity or other benefits, for himself and for any other persons who might have benefited through him; provided that he may have such period of service counted in computing the term of his service if he becomes an employee before age 65, excepting as limited by the provisions of paragraph (a) (3) of Section 8-232 of this Article relating to the basis of computing the term of service.

3. "Any such employee shall retain such right to a refund of such amounts when he shall apply for same until he re-enters the service or until the amount of annuity shall have been fixed as provided in the Article. Thereafter, no such right shall exist in the case of any such employee."

Under the provisions of Senate Bill 32, the former employees of the House of Correction of the City of Chicago became employees of the Sheriff of Cook County through no action on their part. They have effectively left the service of the City of Chicago because of involuntary transfer to County of Cook employment brought about by the provisions of Senate Bill 32.

Generally speaking, an employee of the City of Chicago, who is a member of the Municipal Employees' Officers' and Officials' Annuity and Benefit Fund may not receive a refund of accumulated salary deductions, unless he signs a formal resignation from the Civil Service of the City of Chicago. If the present employees of the House of Correction who now find themselves employees of the County

of Cook under Senate Bill 32 are required to formally resign from the Civil Service of the City of Chicago in order for them to receive their refund, they lose certain Civil Service and other benefits gained while in the service of the City of Chicago. In the silence of the legislature placing specific language in Senate Bill covering this question, it cannot be presumed that the Legislature intended for those employees to suffer such a harsh result.

A study of all the legislation passed in the 76th General Assembly relating to creation of a Department of Corrections within the office of the Sheriff, provides protections for Civil Service Employees of the House of Correction of the City of Chicago who now find themselves employees of the Department of Corrections within the office of the Sheriff, said protections saving all the rights, provisions, etc., that they had as Civil Service Employees, House of Correction, City of Chicago.

We are of the opinion that the Municipal Employees' Annuity and Benefit Fund of Chicago may grant and make payments of refunds to these applicants who were Civil Service employees of the House of Correction and participants in the Municipal Employees' Annuity and Benefit Fund of Chicago and that they do not have to execute a resignation with the Civil Service Commission of the City of Chicago and these former employees of the House of Correction, City of Chicago, may obtain a refund of accumulated salary deductions as shown by the records of your Fund prior to January 1, 1970, without resigning as city employees, provided, that "they otherwise qualify under the Statutes governing the Fund."

REFUNDS—RE-ENTRY

(Municipal Employees' Annuity and Benefit Fund—T. A. McG.—January 31, 1968)

In response to your request for an opinion concerning LILLIAN P. SMITH, the following is submitted:

Your record indicates Lillian P. Smith was certified as a crossing guard on September 8, 1964, having been appointed from a Civil Service list. Your letter further indicates that Lillian P. Smith automatically became a contributor and participant in the Municipal Employees' Annuity And Benefit Fund of Chicago.

Lillian P. Smith resigned from the position of crossing guard on May 15, 1967, and the record indicates she immediately accepted appointment as temporary meter maid for the City of Chicago. Lillian P. Smith, after accepting a position as temporary meter maid, then applied for refund of the accumulated amount credited to her account resulting from deductions made from her salary while employed as a crossing guard.

Your question was: Does the immediate acceptance on the part of Lillian P. Smith of a job as temporary meter maid for the City of Chicago constitute such resignation from her Civil Service job as crossing guard that would permit her refund of the accumulated monies to her credit in the Municipal Employees' Annuity and Benefit Fund?

Article 8-168. Refunds-withdrawal before age 55 or with less than 10 years of service, provides that an employee without regard to length of service, who withdraws before age 55, shall be entitled to a refund of the accumulated sums to his credit as of the date of withdrawal. Any such employee shall retain such right to a refund of such amounts when he shall apply for same until he reenters the service, or until the amount of annuity shall have been fixed as provided in this Article. Thereafter, no such right shall exist in the case of any such employee.

The question is: Did Lillian P. Smith's immediate acceptance of an appointment as a temporary meter maid for the City of Chicago bar her from receiving a refund as requested?

We are of the opinion that Lillian P. Smith's immediate acceptance of a temporary appointment as a meter maid comes under Article 8-168, which provides on a reentry into the service, such reentrance acts as a bar to a refund and that Lillian P. Smith is not entitled to a refund by virtue of the fact that she is still in the service.

WRONGFUL REMOVAL FROM CIVIL SERVICE EMPLOYMENT

(Municipal Employees' Annuity and Benefit Fund—T. A. McG.—January 29, 1970)

We acknowledge receipt of your letter of January 13, 1970, in which you state that on March 5, 1951, the Civil Service Commission entered an order of discharge against John W. Love, Operating Engineer, Department of Public Works, City of Chicago, a participant of the Municipal Employees' Annuity and Benefit Fund of Chicago. You attached a xerox copy of an order entered by Judge Harry M. Fisher on June 18, 1952, in which the order of the Civil Service Commission was vacated and John W. Love was ordered reinstated to his position as Operating Engineer "as of the date of his removal from said position as though he had not been removed therefrom." The court found that John W. Love was damaged in the sum of $333.00, representing the difference between the salary to which he was entitled in the position from which he was removed, and the earnings he received in other employment during the period of his wrongful removal from his civil service employment. The Court ordered that Love recover from the City of Chicago said sum of $333.00 "as and for the damages sustained by him arising out of these causes."

In a supplemental letter dated January 28, 1970, you state that according to the records of the Fund, Mr. Love was born on September 29, 1914, entered the service and became a participant of the Fund on May 23, 1949, as an Operating Engineer, Group C, Bureau of Water and Sewers, where he is presently employed. You also transmitted a xerox copy of a handwritten note, dated December 8, 1969, addressed to "Dear Bob" and purportedly signed by John Love. A footnote states that "The sum of $333 was not the difference in pay but rather the reimbursement for the 29 days suspension."

You request our opinion as to whether Love "is entitled to pay into the Fund an amount equal to that which would have been deducted from his salary for the purposes of the Fund for the period from his discharge to his reinstatement, and to receive service credit for that time."

The law is clear that an illegal discharge does not deprive a civil service employee of any of his pension rights, and his pension or annuity is to ba computed as though he had been continuously in the service. An illegal discharge is no discharge. Opinions of the Corporation Counsel, Vol. 12, p. 302; Vol. 25, p. 168; *People ex rel. Kelly* v. *Bunham,* (1944) 321 Ill. App. 214; *People ex rel. Bourne* v. *Johnson* (1965) 31 Ill. 2d. 324.

Contrary to the statement in your letter of January 16, 1970, to the effect that "during such period no provision was made in the order of the Court reinstating him, for payment of any compensation by the City of Chicago" and the statement of Mr. Love on December 8, 1969 to the effect that the sum of $333 "was not the difference in pay but rather the reimbursement for the 29 days suspension", and the order of June 18, 1952, specifically finds that the sum of $333 represents "the difference between the salary to which he was entitled in the position from which he was removed, and the earnings he received in other employment during the period since his removal from civil service employment." It is this finding, and not the statement of Love or the statement in your letter of January 16, 1970, which is controlling. An illegally discharged civil service employee is entitled to receive his salary during the period of illegal suspension, less any amounts earned by the employee during the period of wrongful suspension and discharge. *People ex rel. Bourne* v. *Johnson,* (1965), 32 Ill. 2d 324; *People ex rel. Hilger* v. *Myers* (1969), 114 Ill. App. 2d 478.

As both the suspension and discharge of John W. Love was illegal, it necessarily follows that Love is entitled to receive credit for service as Operating Engineer for this period of time, and, further, he is entitled to pay into your Fund the amount of salary deductions which would have been made from his salary for annuity purposes during that period of time, all in accordance with the statutes governing the Fund.

Section B. FIREMEN'S ANNUITY AND BENEFIT FUND

EFFECT OF TERM AS PRESIDENT, FIREMEN'S ASSOCIATION ON SERVICE CREDIT

(Secretary, Retirement Board of the Firemen's Annuity and Benefit Fund —S. R. D.—February 3, 1969)

We acknowledge receipt of your communication of September 19, 1968, in which you request our opinion as to the effect, if any, the provisions of Section 6-209 of the Firemen's Annuity and Benefit Act for Cities over 500,000 (Ill. Rev. Stat. 1967, chap. 108½, par. 6-209), as amended by Senate Bill 2152, would have "in computing the service credit of John J. Lynch."

Your letter of September 19, 1968, refers to your previous communications of August 28, 1967 and October 19, 1967. Those communications disclose that John J. Lynch was appointed a Fire Captain on January 1, 1962. He resigned from that position on January 16, 1962, and later he requested the withdrawal of his resignation and asked that his name be restored to the reinstatement list for Fire Captain. This action was approved by the Civil Service Commission on February 7, 1962. Thereafter, each time a vacancy for Fire Captain occurred, appointment was waived by Mr. Lynch, and the waiver was accepted by the Civil Service Commission.

On May 1, 1958, Mr. Lynch was elected President of The Firemen's Association of Chicago and served continuously in that capacity until April 30, 1968. On May 1, 1968, he was reinstated as a captain in the Chicago Fire Department, which position he now occupies.

The question presented is whether the period of time from Mr. Lynch's restoration to the reinstatement list for Fire Captain on January 1, 1962 to May 1, 1968, during all of which time he served as President of The Firemen's Association of Chicago, with the authorization and approval of the Civil Service Commission, can be considered in computing Mr. Lynch's future annuity benefits. In answering this question, we will assume that Section 6-209, as amended by Senate Bill 2152, effective August 6, 1968, will be in full force and effect on the date that Mr. Lynch retires or withdraws from service.

Section 6-209 was the subject of two separate amendments during the 1967 session of the General Assembly. Prior to 1967, the pertinent provisions of Section 6-209 read as follows:

> "In computing the service rendered by a fireman on and after the effective date, the following periods shall be counted in addition to all periods during which he performed the duties of his position, as periods of service for annuity purposes only: All periods of (a) vacation, (b) leave of absence with whole or part pay, (c) leave of absence during which he was engaged in the military or naval service of the United States of America, (d) disability for which he receives any disability benefit and (e) disability for which he receives whole or part pay."

By Senate Bill 1492, approved July 31, 1967, the following provision was added:

> "and (f) leave of absence during which he served as president of The Firemen's Association of Chicago."

By Senate Bill 2152, effective August 6, 1968, Section 6-209 was further amended, to read in part as follows:

> ". . . and (f) leave of absence, or other authorized relief from active duty during which he served as president of The Firemen's Association of Chicago; and he shall have the option of making contributions to the Fund for the various annuity and benefit purposes according to the provisions of this Article as though he were an active fireman, based upon the salary attached to the civil service rank held by him during such authorized absence from duty, and the city shall make the prescribed concurrent contributions for such annuity and benefit purposes as provided in this Article, all to the end that such fireman shall be entitled to receive the same annuities and benefits for which he would otherwise be eligible if he had continued as an active fireman during the authorized periods of absence from duty."

The effect of Section 6-209, as now amended, is that in computing the service rendered by a fireman for annuity purposes, there shall be included the time he is on "leave of absence, or other authorized relief from active duty during which he served as president of The Firemen's Association of Chicago." Mr. Lynch falls within the terms of this provision. He was the President of The Firemen's Association of Chicago during the period from January 1, 1962 to April 30, 1968. During that entire period of time his name was on the reinstatement list for Fire Captain with the written approval of the Civil Service Commission. He was, therefore, on "authorized relief from active duty" during the time he served as President of The Firemen's Association of Chicago.

This construction of Section 6-209, as amended, is in accord with the law. In *Bergin* v. *Board of Trustees* (1964), 31 Ill. 2d 566, Bergin, when he began employment as a teacher for a Cook County School District, executed a written form designating his mother and brother to receive the benefits of the Teachers' Retirement System of Illinois in the event of his death. When Bergin died in December, 1959, this written designation had never been changed, as he had a right to do, despite the circumstances that he had married Mary Bergin and that two children had been born of the marriage prior to his death. On July 24, 1959, approximately four months prior to Bergin's death, amendments to the Teachers' Retirement System of Illinois Act became effective by permitting "dependent beneficiaries" to elect to receive "annuity payments in lieu of the lump sum payments of contributions and the death benefit." The Appellate Court held that even though Bergin designated his mother and brother as his beneficiaries, his wife and two children may defeat the appointment by electing to take the annuity benefits provided for in the 1959 amendment. The Illinois Supreme Court, in sustaining the decision of the Appellate Court, said (p. 573):

> "While the legislative intent is not expressed with the clarity and directness to be desired, it is our opinion that the construction placed upon the amendment to section 25—57.1 by the majority opinion of the Appellate Court is the proper one. One of the prime purposes behind the public policy favoring pension legislation is the protection of the pensioner and his dependents from economic insecurity and, from the language employed, we believe the security of a member's widow, children, or other dependents was the result sought to be achieved by the legislature in this instance."

Likewise, in the situation under consideration the purpose of Article 6 of the Illinois Pension Code is the "protection of the pensioner and his dependents from economic insecurity" and the purpose of Senate Bill 2152 is to protect those firemen who serve as President of The Firemen's Association of Chicago and their dependents from economic insecurity by providing that the time the fireman served as President of The Firemen's Association of Chicago, with the consent of the Civil Service Commission, shall be used in computing the service rendered by a fireman for annuity purposes.

This is in accord with the cardinal rule of statutory construction that one must ascertain and give effect to the legislative intent; that it is the duty of the

courts to uphold the constitutionality and validity of the statute if it can reasonably be done; that it will be presumed the legislature did not intend an absurdity, inconvenience, or injustice in passing the statute; and that the court will always have regard to existing circumstances, contemporaneous conditions, and the object sought to be obtained by the legislature. *Ill. Nat. Bank* v. *Chegin* (1966), 35 Ill. 2d 375, 378; *Ill. Crime Investigating Com.* v. *Buccieri* (1967), 36 Ill. 2d 556, 561; *Petterson* v. *City of Naperville* (1956), 9 Ill. 2d 233, 244-245.

Applying the foregoing principles of law to Senate Bill 2152, it must be presumed that the legislature did not intend absurdity, inconvenience, or injustice to result from adding the provision "and (f) leave of absence, or other relief from active duty during which he served as president of The Firemen's Association of Chicago; * * *", to Section 6-209, as amended by Senate Bill 1492, effective July 31, 1967, (Ill. Rev. Stat. 1967, chap. 108½, par. 6-209).

From a study of Section 6-209, as amended by Senate Bill 1492 and Senate Bill 2152, the legislative intent is apparent. Senate Bill 2152, effective August 6, 1968, added the words "or other authorized relief from active duty" to Section 6-209, as amended by Senate Bill 1492. This phrase contains plain and unambiguous language. It cannot be ignored. It provides that in computing the service rendered by a fireman for annuity purposes there shall be included the time spent as President of The Firemen's Association of Chicago, if his absence from his position in the Fire Department was consented to by the Civil Service Commission. Here, during the time Mr. Lynch served as President of The Firemen's Association of Chicago his name was on the reinstatement list for Fire Captain. The Civil Service Commission authorized and approved in writing the placing of Mr. Lynch's name on the reinstatement list for Fire Captain. Thereafter, each time Mr. Lynch waived an appointment as Fire Captain his waiver was accepted by the Civil Service Commission. Mr. Lynch's absence from his position as Fire Captain while serving as President of The Firemen's Association of Chicago was authorized by the Civil Service Commission and, therefore, in accordance with the provisions of Senate Bill 2152, this time should be included in computing Mr. Lynch's annuity benefits.

This construction is further supported by the provision contained in Senate Bill 2152 to the effect that a fireman, who served as President of The Firemen's Association of Chicago, shall have the option of making contributions to the Fund "as though he were an active fireman, based upon the salary attached to the civil service rank held by him during such authorized absence from duty" and that the city "shall make the prescribed concurrent contributions * * * all of the end that such fireman shall be entitled to receive the same annuities and benefits for which he would otherwise be eligible if he had continued as an active fireman during the authorized periods of absence from duty."

In a letter dated December 10, 1968, you stated that if Mr. Lynch came within the provisions of Senate Bill 2152 and, was entitled to have the time he was on leave from his position as Fire Captain, while serving as President of The Firemen's Association of Chicago with the authorization and approval of the Civil Service Commission, "there would be due this Fund in lieu of salary contributions the sum of $5433.68 as of January 1, 1969, not including deductions for a possible widow's annuity." You also stated that if Mr. Lynch "were to remain in the fire service until his attainment of age 63 on February 21, 1969, his annuity would amount to approximately $481.00 a month."

We are of the opinion that the present status of Mr. Lynch is controlled by the amendatory provisions contained in Senate Bill 2152 and, by said provisions, Mr. Lynch is entitled to have the period of time that he was on leave from his position as Fire Captain, while serving as President of The Firemen's Association of Chicago, with authorization of the Civil Service Commission, included in computing his annuity benefits. We are also of the opinion that the Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago is legally bound to accept the sum of $5433.68 from Mr. Lynch as payment of his contributions in lieu of salary deductions, to January 1, 1969, in accordance with the provisions of Section 6-209, as amended by Senate Bill 2152, and as herein construed.

FIRE COMMISSIONER'S ANNUITY

(Retirement Board—Firemen's Annuity and Benefit Fund—S. R. D.—August 9, 1968)

We transmitted to you on March 1, 1968, a cashier's check No. 033428 dated February 29, 1968, drawn on the United Bank of America and payable to the order of the Firemen's Annuity and Benefit Fund of Chicago, in the sum of $17,430.75, on behalf of Fire Commissioner Robert J. Quinn. The proceeds of the check were to be applied to his pension account in accordance with the provisions of House Bill 2337 enacted at the 1967 regular session of the Illinois General Assembly, which amended Section 6-163 of Article 6 of the Illinois Pension Code (Ill. Rev. Stat. 1967, chap. 108 ½, par. 6-163). On July 6, 1968, you returned the cashier's check to this office, stating in your letter of transmittal:

> "We are returning, enclosed herewith, the Cashier's check (#033428 dated 2/29/68) in the amount of $1743.75, [sic, should be $17,430.75], which you forwarded to this office on March 1, 1968, on behalf of the Fire Commissioner, Robert J. Quinn.
>
> "House Bill Number 2337 contains no provision to accept such payment, and in view of the fact that we can see no other provision in the Code governing the operation of this Fund which permits us to accept this amount, we feel it best to return it to you for safe-keeping.
>
> "Your letter of transmittal will be presented at the next regular meeting of this Board, to be held on Thursday, March 14, 1968, in the office of the Fund."

To date, we have received no notification as to any action the Board may have taken pertaining to this matter and, therefore, we presume that the same is still pending before the Board.

On May 9, 1968, we received a communication from City Comptroller Otto H. Loser, stating that on April 25, 1968, he received a letter from Joseph F. Quinn, Acting Secretary of the Firemen's Annuity and Benefit Fund, requesting that the City Comptroller discontinue making pension deductions from the salary of Fire Commissioner Robert J. Quinn, effective May 13, 1968. Mr. Loser requests our opinion as to "whether this office legally is required to honor the request from Firemen's Annuity and Benefit Fund."

It is our opinion that Section 6-163, as amended in 1967, provides that the minimum annuity for a fireman be based on the actual amount of annual salary appropriated for the position he holds in the Fire Department, irrespective of whether it is classified in the civil service. We are, therefore, of the opinion that under the provisions of Article 6 of the Illinois Pension Code (Ill. Rev. Stat. 1967, chap. 108 ½, Article 6), and the law pertaining thereto, pension deductions should be made from the salary of Fire Commissioner Robert J. Quinn upon the basis of the actual annual salary paid him as Fire Commissioner. Accordingly, we are again transmitting to you cashier's check No. $33428 dated February 29, 1968, drawn on the United Bank of America and payable to the order of the Firemen's Annuity and Benefit Fund of Chicago, in the sum of $17,430.75, which represents contributions to be deposited and credited to the pension account of Robert J. Quinn, computed on the basis of his actual annual salary as Fire Commissioner. We are also advising City Comptroller Otto H. Loser, that his office should continue to make pension deductions from the salary of Fire Commissioner Robert J. Quinn, on the basis of his actual annual salary as Fire Commissioner.

Statutory and ordinance provisions clearly provide for and define the establishment of the Fire Department and the creation of the office of Fire Commissioner. Section 11-6-1 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, chap. 24, par. 11-6-1) provides that the corporate authorities of each municipality may provide and operate fire stations, and all material and equipment that are needed for the prevention and extinguishment of fires. In accord-

ance with the foregoing statutory provision, the City of Chicago (Municipal Code of Chicago, Chapter 12) established an executive department of the City known as the Fire Department. Section 12-1 provides that the Department shall include a Fire Commissioner. Section 12-4 creates the office of Fire Commissioner and provides that he shall have the management and control of all matters and things pertaining to the Fire Department and of all the persons employed therein. It further provides that the Fire Commissioner shall be appointed by the Mayor, by and with the advice of the City Council. Robert J. Quinn was appointed Fire Commissioner on March 14, 1957 (C.J. 3-14-57, p. 4482), and since that date has continuously occupied the position of Fire Commissioner. In light of the foregoing, it is apparent that Robert J. Quinn, as the Fire Commissioner, supervises and manages all of the persons, including firemen, employed in the Fire Department, and, therefore, is a member of the Fire Department of the City of Chicago.

It is also apparent that the position of Fire Commissioner comes within the provisions of Article 6 of the Illinois Pension Code (Ill. Rev. Stat. 1967, chap. 108½, Article 6). Prior to the 1967 amendment, Section 6-163 provided, in part, as follows:

> "For the minimum annuity, disability pension and duty disability benefit under this Article, it shall be assumed that the annual salary of a fireman is the amount set out and appropriated for the rank or grade held by him in the annual budget or appropriation of the city, * * *."

At that time the minimum annuity of a fireman was based upon the amount of annual salary appropriated for the fireman's rank and grade. No provision was made for the method of computing the minimum annuity of one occupying a position in the Fire Department which was not classified under civil service, such as the position of Fire Commissioner. This, even though the Annual Appropriation Ordinance of the City of Chicago contained a salary appropriation for the Fire Commissioner as a part of the appropriation for the Fire Department. (Examples: 1967 Annual Appropriation Ordinance, p. 233, Fire Commissioner $30,000; 1968 Annual Appropriation Ordinance, p. 239, Fire Commissioner $30,000.)

Even prior to the 1967 amendment to Section 6-163, the Corporation Counsel of the City of Chicago considered the position of Fire Commissioner a permanent position in the Fire Department and was of the opinion that under Article 6 of the Illinois Pension Code the pension pertaining to the position of Fire Commissioner should be based on the actual annual salary appropriated for Fire Commissioner in the Annual Appropriation Ordinance (Opinions of Corporation Counsel, Vol. 24, p. 172). The 1967 amendment to Section 6-163 substantiates the foregoing opinion of the Corporation Counsel. It accomplished this result by striking the words "the minimum annuity" from the first sentence and adding a new first sentence to Section 6-163 (Ill. Rev. Stat. 1967, chap. 108½, par. 6-163). The pertinent parts of Section 6-163 now provide as follows:

> "For age and service annuity, the minimum annuities prescribed in Sections 6-123 and 6-128 and for disability benefits, salary as defined in Section 6-111 shall be the basis of computation. For disability pension and duty disability benefit under this Article, it shall be assumed that the annual salary of a fireman is the amount set out and appropriated for the rank or grade held by him in the annual budget or appropriation of the city * * *."

Section 6-123 provides for minimum annuities for present employees (a present employee is one who entered the employment of the City as a fireman prior to July 1, 1931). Section 6-128 provides for minimum annuities for future entrants, (a future entrant being one who entered the employ of the City as a fireman after July 1, 1931). Fire Commissioner Quinn entered the service of the City as a fireman on November 17, 1928, and, therefore, the minimum amount of his annuity is set in accordance with the provisions of Section 6-123 and Section 6-111.

Section 6-111 provides that the annual salary of a fireman for age and service annuity and minimum annuity is "the actual amount of the annual salary."

Section 6-123 provides that "salary" shall be determined "by striking an average of the 5 consecutive highest years of salary within the last 10 years of service immediately preceding withdrawal."

The net result of the 1967 Amendment to Section 6-163 is that the minimum annuity for a fireman is based on "the actual amount of the annual salary" appropriated for the position held in the Fire Department. The minimum annuity is no longer computed on "amount set out and appropriated for the rank or grade held by him in the annual budget or appropriation of the city." Now, the actual amount of the annual salary appropriated for the position occupied by a fireman (rather than the amount appropriated for the rank or grade held by him) is controlling. The salary to be used as the basis for computing the minimum pension and annuity of Fire Commissioner Quinn should, therefore, be the actual amount of the annual salary appropriated for the position he occupies and not the amount of annual salary appropriated for the civil service rank or grade held by him prior to his appointment as Fire Commissioner.

This conclusion is sustained by law. Pension statutes should be construed in favor of the employee. The general principle of law is stated in 62 J.C.S. (1949 Ed.) Municipal Corporations, Section 614(c) as follows (pp. 1269-1270):

> "The purpose of the acts being regarded as beneficial or remedial, they should be liberally construed in favor of those to be benefited and the objects sought to be accomplished."

In *Colton* v. *Trustees of Pension Fund* (1919), 287 Ill. 56, the facts disclosed that Section 8 of the Act creating a Board of Trustees of the Firemen's Pension Fund, as amended in 1907, provided for pensions after a fireman had twenty-two years of service, while Section 7 of the Act providing for retirement contained no requirement of twenty-two years of service. The question was whether Colton, a fireman for the city of Bloomington, came within the provisions of the Act even though he had not served twenty-two years. The court, in construing the inconsistent provisions of Sections 7 and 8, held that Colton came under the provisions of the Act even though he did not have twenty-two years of service, saying (p. 61):

> "The foundation rule in construing statutes is to ascertain and give effect to the intention of the law-making body, but the intention must be that which is expressed in the statute, and the language of the statute cannot be disregarded unless the court can say that the meaning is doubtful and adherence to the letter would lead to injustice or absurdity. The purpose of pension laws is beneficial, and statutes of that character should be liberally construed in favor of those intended to be benefited. In view of the general purpose and language of the act we are constrained to declare the legislative intention to have been to allow a pension upon the death of a fireman in the service in the fire department."

In *Bergin* v. *Board of Trustees* (1964), 31 Ill. 2d 566, Bergin, when he began employment as a teacher for a Cook County School District, executed a written form designating his mother and brother to receive the benefits of the Teachers' Retirement System of Illinois in the event of his death. When Bergin died in December, 1959, this written designation had never been changed, as he had a right to do, despite the circumstances that he had married Mary Bergin and that two children had been born of the marriage prior to his death. On July 24, 1959, approximately four months prior to Bergin's death, amendments to the Teachers' Retirement System of Illinois Act became effective by permitting "dependent beneficiaries" to elect to receive "annuity payments in lieu of the lump sum payments of contributions and the death benefit." The Appellate Court held that even though Bergin designated his mother and brother as his beneficiaries, his wife and two children may defeat the appointment by electing to take the annuity benefits provided for in the 1959 amendment. The Illinois Supreme Court, in sustaining the decision of the Appellate Court, said (p. 573):

> "While the legislative intent is not expressed with the clarity and directness

to be desired, it is our opinion that the construction placed upon the amendment to section 25—57.1 by the majority opinion of the Appellate Court is the proper one. One of the prime purposes behind the public policy favoring pension legislation is the protection of the pensioner and his dependents from economic insecurity and, from the language employed, we believe the security of a member's widow, children, or other dependents was the result sought to be achieved by the legislature in this instance."

Likewise, in the situation under consideration, the purpose of Article 6 of the Illinois Pension Code is the "protection of the pensioner and his dependents from economic insecurity"; and the purpose of the 1967 Amendment to Section 6-163 is to protect all firemen and their dependents from economic insecurity by providing that a fireman's minimum annuity be based on the fireman's actual annual salary for the position occupied, irrespective of the fireman's rank or grade under civil service.

This is in accord with the cardinal rule of statutory construction that one must ascertain and give effect to the legislative intent. In *Ill. Nat. Bank* v. *Chegin* (1966), 35 Ill. 2d 375, the court said (p. 378):

"In the construction of a statute the law requires that it be given a reasonable interpretation. Under this rule, statutes are to be construed according to their intent and meaning, taking into consideration the reason for the enactment, the existing circumstances, and the objects sought to be obtained by the legislature. *(Southmoor Bank and Trust Co.* v. *Willis,* 15 Ill. 2d 388; *Spring Hill Cemetery of Danville* v. *Ryan,* 20 Ill. 2d 603.)"

In *Ill. Crime Investigating Com.* v. *Buccieri* (1967), 36 Ill. 2d 556, the court, in discussing the rules applicable to statutory construction, said (p. 561):

"Under the fundamental rules of statutory construction as laid down by this court from time to time, it has long been held that it is our duty to construe acts of the legislature so as to uphold their constitutionality and validity if it can reasonably be done, and, further, that if their construction is doubtful, the doubt will be resolved in favor of the validity of the law attacked. *(People* v. *Illinois Toll Highway Com.,* 3 Ill. 2d 218; *People ex rel. Dolan* v. *Dusher,* 411 Ill. 535; *People* v. *Newcom,* 318 Ill. 188). Complementary principles of equal force and stature are that the legislature is presumed to act in view of the constitution and not to intend a violation of its provisions or the enactment of a void law. *(Follett's Illinois Book and Supply Store, Inc.* v. *Isaacs,* 27 Ill. 2d 600; *People ex rel. Bell* v. *New York Central Railroad Co.* 10 Ill. 2d 612.) Similarly, it will be presumed the legislature did not intend absurdity, inconvenience or injustice. *(Illinois National Bank* v. *Chegin,* 35 Ill. 2d 375; *People ex rel. Barrett* v. *Thillens,* 400 Ill. 224.)"

In *Petterson* v. *City of Naperville* (1956), 9 Ill. 2d 233, the court said (pp. 244-245):

"But the primary object of statutory construction is to ascertain and give effect to legislative intent. In ascertaining legislative intent, the courts should consider the reason or necessity for the enactment and the meaning of the words, enlarged or restricted, according to their real intent. Likewise the court will always have regard to existing circumstances, contemporaneous conditions, and the object sought to be obtained by the statute. *People ex rel. Holvey* v. *Kapp,* 355 Ill. 596; *Chicago Packing and Provision Co.* v. *City of Chicago,* 88 Ill. 221.

Other cases to the same effect are *Hagen* v. *The City of Rock Island* (1959), 18 Ill. 2d 174; *Illinois Chiropractic Society* v. *Giello* (1960), 18 Ill. 2d 306; *Radford* v. *Cosmopolitan Nat. Bank of Chicago* (1964), 52 Ill. App. 2d 240.

Applying the foregoing principles of law to the 1967 Amendment to Section 6-163 of the Illinois Pension Code (Ill. Rev. Stat. 1967, chap. 108½, par. 6-163), it must be presumed that the legislature did not intend absurdity, inconvenience, or injustice to result from the passage of the amendment. From a study of

Section 6-163 prior to and subsequent to the 1967 Amendment, the legislative intent is apparent. Section 6-163, as amended, clearly shows that the legislature intended to base the minimum annuity of a fireman upon the actual amount of annual salary appropriated in the annual budget for the particular position occupied by the fireman. It is apparent that the legislature intended that after the 1967 Amendment to Section 6-163 the minimum annuity should not be based upon the annual salary appropriated for the civil service rank or grade held by the fireman in the annual budget of the City of Chicago. This is the clear intent of the language employed. Any other interpretation would result in an absurdity and in nullifying the clear and explicit language of the first sentence of Section 6-163, as amended in 1967. It would result in an injustice to a fireman who occupies a responsible and permanent position in the Fire Department different than his classified position. It would deny the full protection from economic insecurity to those firemen who, because of their ability, integrity, and long service have been promoted to a position in the Fire Department not classified under the civil service.

The position of Fire Commissioner in the Fire Department of the City of Chicago comes within the provisions of the 1967 Amendment to Section 6-163 and, therefore, Robert J. Quinn, who has occupied the position of Fire Commissioner since March 14, 1957, should have his minimum annuity computed on the basis of "the actual amount of the annual salary" appropriated for the position of Fire Commissioner.

It might be argued that there is a conflict between Section 6-211 and Section 6-163, as amended in 1967. Section 6-211 (Ill. Rev. Stat. 1967, chap. 108½, par. 6-211) provides, in part, as follows:

> "No annuity, pension or other benefit shall be paid to a fireman or widow, under this Article, based upon any salary paid by virtue of a temporary appointment. All contributions, annuities and benefits shall be related to the salary which attaches to the permanent position of fireman. Any fireman temporarily serving in a position or rank other than that to which he has received permanent appointment shall be considered, while so serving, as though he were in his permanent position or rank, * * *"

Section 6-163, as amended, contains no such limitation. Section 6-163, since the 1967 amendment, now applies to every fireman of the City of Chicago and, for minimum annuity purposes, his actual annual salary (as provided in Section 6-111) shall be used in computation of his minimum annuity, irrespective of the rank or grade held by him under civil service. Robert J. Quinn is a fireman occupying the permanent position of Fire Commissioner, (Opinions of Corporation Counsel Vol. 24, p. 172), and, therefore, his minimum annuity should be computed on the basis of his actual annual salary appropriated for the position of Fire Commissioner. However, if we were to concede, for the purposes of argument, that the position of Fire Commissioner is a temporary position, even then the provisions of Section 6-163, as amended in 1967 would take precedence over the provisions of Section 6-211. In *Mattoon Grocery Co.* v. *Stuckemeyer* (1927), 326 Ill. 602, the court said (p. 607):

> "The rule as to construction of statutes which apparently cover the same subject, requires that both these acts be given effect in so far as it is possible to do so, and where two acts are repugnant, the one last enacted must be taken as a modification or amendment of the prior act, *Chicago and Riverdale Lumber Co.* v. *Vallenga*, 305 Ill. 415; *Hacken* v. *Isenberg*, 288 id. 589."

Likewise, Section 6-163, amended in 1967, takes precedence over the provisions of Section 6-211. Therefore, under the statutory provisions as they now exist, there is no requirement, as contained in Section 6-211, that "all contributions, annuities and benefits shall be related to the salary which attaches to the permanent position of fireman." Neither does the provision, in Section 6-211, that "any fireman temporarily serving in a position or rank other than that to which he has received permanent appointment shall be considered, while so serving, as though he were in his permanent position or rank" have any further application.

Now, only the provisions of Section 6-163, as amended in 1967, apply in the computation of minimum annuities for a fireman occupying a position in the Fire Department of the City of Chicago. The minimum annuity is based upon the actual salary appropriated in the annual budget for the position occupied by the fireman, irrespective of his grade or rank in civil service. Robert J. Quinn, a fireman, has occupied the position of Fire Commissioner since March 14, 1957. Under the present provisions of Section 6-163, he is legally entitled to have his minimum annuity computed on the basis of the actual annual salary appropriated for the position of Fire Commissioner.

The foregoing discussion is in accordance with the "Interpretation of the Intent and Meaning of Amendment to House Bill No. 2337 approved September 5, 1967", prepared by A. A. Weinberg, Actuary for the Illinois Public Employees Pension Laws Commission, a copy of which is attached hereto.

It is our opinion that it is the legal duty of The Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago to accept the enclosed cashier's check and take such steps as may be necessary to the end that the minimum annuity of Robert J. Quinn will be computed on the basis of his actual annual salary as Fire Commissioner in accordance with the provisions of the Illinois Pension Code, Section 6-163, as amended in 1967 (Ill. Rev. Stat. 1967, chap. 108½, par. 6-163).

1970 DEDUCTIONS FROM FIREMEN'S PAYROLL

(City Comptroller—S. R. D.—January 20, 1970)

We acknowledge receipt of your recent communication attaching a letter from The Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago, dated January 8, 1970, stating that "8⅝% should be deducted each period from the salaries of members of the Chicago Fire Department who are participants in this Fund" and that you should, in addition, deduct $1.25 for each pay period for the Ordinary Death Benefit Fund. You ask whether "these new rates" are "in accordance with the Statutes as revised by the Legislature in 1969."

Investigation discloses that the rates set forth in The Retirement Board letter are the same as now exist. However, the Secretary of the Board states that you are annually notified of the rates in existence, to comply with the provisions of Section 6-181 of the Firemen's Annuity and Benefit Fund—Cities over 500,000 Act (Ill. Rev. Stat. 1967, Chap. 108½, par 6-181).

In light of the foregoing, we are of the opinion that you should continue to make the deductions as set forth in the letter from The Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago.

PAYMENT OF HEALTH INSURANCE FOR WIDOWS OF KILLED FIREMEN AND POLICEMEN

(City Comptroller—S. R. D.—March 19, 1971)

We acknowledge receipt of your recent communication requesting our opinion as to whether the City shall pay the hospital and medical insurance premiums for widows of policemen and firemen killed in the line of duty.

Section 22-306 of the Pension Act (Ill. Rev. Stat., 1969, chap. 108½, par. 22-306) provides in part as follows:

> "The corporate authorities of any city or village may provide by ordinance for the payment by said city or village of all or any part of the cost of a hospital plan or medical-surgical plan, or both, for the dependents of any policeman or fireman killed in the line of duty or who dies as the result of duty connected injuries, and for any policeman or fireman and his dependents,

provided his retirement is caused by a duty injury. 'Dependent' as used in is this paragraph shall mean the wife of the policeman or fireman and his minor children less than 20 years of age and living at home and dependent on the policeman or fireman for support. Amended by P.A. 76-564, § 1, eff. July 28, 1969."

In accordance with the above cited statutory authority, the 1971 Appropriation Ordinance (C.J. 12-11-70, p. 9933) provides as follows:

"For payment of the monthly single or individual premium rate and one hundred per-cent of the monthly family premium rate for hospital and medical care for Police Department and Fire Department Sworn Personnel on Duty Disability Pension and their dependents, and for widows and dependents of Police Department and Fire Department Sworn Personnel killed or fatally injured in the performance of their duties. (Ill. Rev. Stat., Chap. 108½, par. 22-306). $200,000."

It is our opinion that in the light of the foregoing statutory and ordinance provisions, you should take such steps as may be necessary to provide for the payment of hospital and medical insurance for widows of policemen and firemen killed in the line of duty.

Section C. POLICEMEN'S ANNUITY AND BENEFIT FUND

EFFECTS OF DISABILITY BENEFITS ON ANNUITY

(Retirement Board of the Policemen's Annuity and Benefit Fund—T. A. McG.—July 13, 1967)

In response to your request for an opinion concerning Patrolman Walter F. Zalatoris, the following is submitted:

Your letter states Patrolman Zalatoris was born October 17, 1911, appointed a patrolman on the Chicago Police Department January 22, 1946. On June 1, 1952, Patrolman Zalatoris was granted a leave of absence to accept ordinary disability benefits which were paid to him until December 23, 1953, at which time the benefits expired.

In November, 1953, Patrolman Zalatoris was informed that if he resigned from the Police Department on December 23, 1953, the date his ordinary, disability benefits expired, he would be entitled to an annuity of $297.72 per year or $24.81 per month.

Your letter further states that Patrolman Zalatoris was carried by the Chicago Police Department on a leave of absence since December 23, 1953, and that on May 11, 1967, Patrolman Zalatoris signed a resignation from the Department. At that time, on May 11, 1967, he was 55 years, six months and 24 days of age, with a total of 7 years, 10 months, and 26 days of service.

You request an opinion as to the correctness of computing Patrolman Zalatoris' annuity.

Section 5-158 of the Police Pension Act states as follows:

"Annuity After Withdrawal While Disabled. A policeman whose disability continues beyond the maximum period of eligibility for disability benefit and who withdraws while still disabled and before age 50, shall receive annuity as can be provided from the amounts accumulated from salary deductions and sums contributed by the City for his retirement annuity. *The annuity shall be computed as of the age of the policeman on the date of his withdrawal.*"

Specifically, the question presented is, does Patrolman Zalatoris come under Section 5-158 of the Police Pension Act.

We are of the opinion that Section 5-158 specifically states that a policeman on disability beyond the maximum period of eligibility for disability benefit, his annuity shall be computed at his age on the date of his withdrawal from the service. Patrolman Zalatoris was still a member of the Chicago Police Department on leave. As such, he could, at any time, have gone back to work or, on reaching the proper age, withdraw from the service and be eligible for his annuity.

We believe that you would be correct in computing Patrolman Zalatoris' annuity on the basis of Section 5-158.

EFFECT OF DIVORCE AND RECONCILIATION ON WIDOW'S ANNUITY

(Retirement Board of the Policemen's Annuity and Benefit Fund—T. A. McG.—July 14, 1967)

In response to your request for an opinion concerning payment of a widow's annuity to Virginia Murray, widow of Frank G. Murray, the following is submitted:

You letter points out that Frank G. Murray was born February 23, 1903, appointed as patrolman on the Chicago Police Department July 1, 1929. On June 2, 1943, Officer Murray married Virginia Roberts.

Your letter further points out that Officer Murray resigned from the Chicago Police Department on February 5, 1951. Virginia Roberts Murray divorced Officer Frank G. Murray in Columbia County, Wisconsin on July 29, 1955. On January 13, 1957, Virginia Murray remarried Officer Frank G. Murray.

Your letter further points out that Officer Murray died on February 28, 1967. At the time of Officer Frank G. Murray's resignation, he was 48 years of age.

He did not receive his annuity until after he was 50 years of age, starting February 23, 1953. An he has been paid an annuity of $75.03 per month until the day of his death on February 28, 1967.

Mrs. Virginia Murray was his wife on the date of his resignation from the Department on February 5, 1951, and was still married to him when he first received his annuity on February 23, 1953. It wasn't until 2 years and 6 months later that Virginia Murray divorced Frank G. Murray in Wisconsin, remarrying him on January 13, 1957, prior to his 57th birthday.

We are of the opinion that Mrs. Murray is entitled to the payment of a widow's annuity as the widow of Frank G. Murray. She was his lawful wife on the date of his resignation from the Department, she was his wife when he started to draw an annuity from the fund, and she with his lawful wife on the date of his death prior to his 57th birthday. As such, she must be regarded as his lawful widow and entitled to payment of a widow's annuity.

TERMINATION OF PENSION BENEFITS FOR POLICE OFFICERS CONVICTED OF FELONIES

(Retirement Board of the Policemen's Annuity and Benefit Fund—R. F. F.—July 13, 1972)

This is in response to your letter inquiring whether the statute requiring termination of pension benefits for police officers convicted of felonies performed in connection with their duties is still valid. We reaffirm our opinion of April 14,

1960 (Opinions of the Corporation Counsel, vol. 24, p. 192) that the statute is valid.

Sec. 227 of the Policemen's Annuity and Benefit Fund Act (Ill. Rev. Stat. 1971 ch. 108½, par. 5-227) states as follows:

> None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as a policeman.
>
> None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony while in receipt of disability benefits.
>
> This section shall not operate to impair any or vested right heretofore acquired under any law or laws continued in this Article, nor to preclude the right to a refund.
>
> All future entrants entering service subsequent to July 11, 1955, shall be deemed to have consented to the provisions of this section as a condition of coverage."

If a police officer is convicted of a felony (even if the conviction was following his retirement) for an act "relating to or arising out of or in connection with his service as a policeman" his pension is subject to termination.

The Policemen's Annuity and Benefit Fund requires mandatory participation on the part of all police officers (sec. 5-169 et seq.). The status of such mandatory pension funds has not always been clear. However, the great weight of Illinois authority holds that mandatory pension programs are "expectancies" or "gratuities" which the legislature may reduce at will. See Cohn, Public Employee Retirement Plans—The Nature of Employees' Rights, 1968 University of Illinois Law Form pp. 32, 51-58 and cases cited at p. 52 n. 80.

And even though some courts have characterized benefits of the mandatory funds as "deferred compensation for services rendered," the universal result, the Cohn article notes at pp. 53-4, has been that the courts have permitted the legislature to make a reduction in benefits. There is thus no impediment to eliminating benefits of officers convicted of felonies.

Even if benefits of the Policemen's Annuity and Benefit Fund were to be called "vested" (and it should be noted there is no authority for calling them vested), sec. 5-227 would still apply. In *Keegan* v. *Board of Trustees,* 412 Ill. 430 (1952) it was argued that a statute purporting to grant pension fund contributors a "vested" interest in benefits prevented the legislature from reducing benefits of certain beneficiaries. However the Illinois Supreme Court held that though vested, the benefits were nevertheless subject to legislative limitation:

> "[A] vested right is created in the participant to share in the fund in the manner and on such terms as the legislature may from time to time, determine best serves the welfare of the participants and the people of the State." 412 Ill. at p. 435-6

Similarly, the Ohio courts hold that though benefits might be "vested," a participant will not be eligible unless he complies with all requirements and is qualified for a pension. *O'Neal* v. *Trustees,* 160 N.E.2d 563, 566, 568 (O.C.P. 1959); *State ex rel. Ickes* v. *Slinger,* 73 N.E.2d 385, 387 (O.A. p. 1946).

The adoption of the 1970 Illinois Constitution does not affect the validity of sec. 5-227. Article 13 sec. 5 of the Constitution provides:

> Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

A reading of the debates on this section makes it clear that it was passed

because of the concern that pension funds might be unable to pay fund benefits because they are generally not fully funded. See Proceedings of 6th Illinois Constitution Convention, vol. 89, July 21, 1970, pp. 88-131. This section was intended to prohibit diminution of benefits as a whole and was not meant to prevent the termination of benefits to a policeman who had not fulfilled all the qualifications entitling him to a pension.

Indeed, if the intent of Article 13 sec. 5 was to convert all pension plans to contractual ones, it strengthens the provisions of sec. 5-227. If the relationship of the Policeman's Annuity and Benefit Fund to its members is a contractual one, then one of the contractual obligations of each member is the continuous faithful performance of the duties of a police officer. Sec. 5-227 establishes that as a condition precedent for pension eligibility. Thus, the commission of a felony in the course of the duties as a police officer is an act which may be thought of as a breach of the "contract" between the Fund and the officer.

The State of New York has a constitutional provision which is essentially the same as article 13 sec. 5. New York Constitution Article 5, section 7. In several instances, New York courts have held that benefits could be reduced despite the constitutional proviso that "benefits . . . shall not be diminished" in cases where a participant had not met statutory conditions entitling him to the benefits he claimed. See *Hoar* v. *City of New York* 295 N.Y. 274 67 N.E.2d (1956). *Holz* v. *Kowal* 27 App. Div. 2d 128, 276 N.Y.S. 398 (1967).

A recent 3-judge district court decision also reinforces the validity of sec. 5-227. In *Hiss* v. *Hampton* 338 F.Supp. 1141 (D.C. 1972), Congress had passed a law which made employees ineligible for pensions if they were convicted of perjury. The Court held that Hiss could not be deprived of his pension because the provision of the Act terminating his eligibility was passed long after the date he committed perjury. However, the clear implication of this decision is that had the act been passed before the commission of the perjury, the pension could be legally terminated. Sec. 5-227 is valid, since, like the statute in *Hiss*, it penalized activity detrimental to the government, but unlike the *Hiss* statute, it was in effect prior to the time of the officer's offensive conduct.

Sec. 5-227 is valid and serves the salutary purpose of notifying police officers that, in addition to other penalties that may be imposed by law, they also stand to lose pension benefits if they violate the public trust in the performance of their duties.

INTERPRETATION OF NEW POLICEMEN'S WIDOWS' ANNUITY BENEFITS

(Retirement Board of the Policemen's Annuity and Benefit Fund—S. R. D.—August 30, 1971)

We acknowledge receipt of your letter of August 23, 1971, requesting our interpretation of House Bill 1489, which adds Section 5-167.4 to the Policemen's Annuity & Benefit Fund—Cities Over 500,000 Act (Ill. Rev. Stat., 1969, chap. 108½, Article 5). The Bill was approved by Governor Richard B. Ogilvie on August 4, 1971, and provides as follows:

> "Any widow in receipt of a widow's annuity on July 1, 1971 shall be entitled to a minimum monthly annuity of $150 in lieu of the monthly annuity she is receiving, such to begin in the month of July, 1971 if she is age 50 or older on such date or to begin with the annuity payment in the month in which she attains the age of 50, if such age is attained after the month of July, 1971.
>
> "The city, in addition to the contributions otherwise made by it under the other provisions of this Article, shall make such contributions as are necessary for the minimum widow's annuities provided under this Section in the manner prescribed in Section 5-175."

You state that at the meeting of the Retirement Board held on August 19, 1971, the Trustees raised the following questions:

> "1. According to the provisions set forth in Sec. 5-167.4, does this section apply to all widows or just those who are in receipt of an annuity prior to July 1, 1971?
>
> "2. Since the Governor approved H. B. 1489 on August 4, 1971, are we obligated to make retroactive annuity payments from July 1, 1971, as set forth in H. B. 1489, or to begin annuity payments from August 4, 1971 the date the Governor signed the bill into law?"

In answer to your first question, the provisions of House Bill 1489 are limited to "any widow in receipt of a widow's annuity on July 1, 1971," and, therefore, it is our opinion that the statute is limited in its application to those widows who were receiving a widow's annuity on July 1, 1971.

Your second question is whether the increased annuity payments should begin "from July 1, 1971, as set forth in House Bill 1489 or to begin annuity payment from August 4, 1971, the date the Governor signed the bill into law?"

Generally, the effective date of a statute is the date upon which the Bill is approved by the Governor. *White* v. *Barrett,* 45 Ill. 2d 206, 209 (1970). However, if the language of the statute requires retroactive application, it is the duty of the Court to so apply it. Further, a statute is not retroactive just because it relates to antecedent evidence or because it draws upon antecedent facts for its operation. In *U. S. Steel Credit Union* v. *Knight,* 32 Ill. 2d 138 (1965), the Court held section 25 of the Credit Union Act, effective in July, 1963, and providing the annual supervision fees to be paid to the Department of Financial Institutions, had retroactive application, subjecting the Union to pay fees payable for the year 1963, saying (142):

> "At the same time, however, it is well settled that a statute is not retroactive just because it relates to antecedent events, or because it draws upon antecedent facts for its operation. (*Sipple* v. *University of Illinois,* 4 Ill. 2d 593; *Cox* v. *Hart,* 260 U.S. 427, 67 L.ed 332; *John McShain, Inc.* v. *District of Columbia,* (D.C. cir.) 205 F. 2d 882.) Retroactive legislation is not favored, and as a general rule statutes are construed to operate prospectively unless the legislative intent that they be given retroactive operation clearly appears from the express language of the acts, or by necessary or unavoidable implication (*Bauer Grocer Co.* v. *Zelle,* 172 Ill. 407; *Anderson* v. *Board of Education,* 390 Ill. 412.) Conversely, if the language of a statute requires retroactive application, it is the dutv of the courts to so apply it. (*People ex rel. Kroner* v. *Abbott,* 274 Ill. 380.)"

and concluded (p. 143):

> "Had it been the legislative intent that fees for 1963 could be collected only for the period after the effective date of the amendment, it would have been a simple matter to limit 1963 fees to the unexpired portion of such year. (*Cf. People ex rel. Gill* v. *Hamilton,* 366 Ill. 455, 460-461.) The legislature did not so, but spoke only in terms of a fee 'for the preceding calendar year.' Under all of the circumstances, we think the intent and purpose of the legislature to apply the amendment to the full year 1963 is clear."

Likewise, House Bill 1489 specifically stated that the increased monthly annuity is "to begin in the month of July, 1971". The language of the Bill is clear and requires that the intent and purpose of the legislature be given consideration. In our opinion, therefore, the annuity payments provided for in House Bill 1489 should begin in the month of July, 1971.

Summarizing the foregoing, it is our opinion that the provisions of House Bill 1489 apply only to those widows who were receiving an annuity on July 1, 1971, and that the payment of the minimum monthly annuity of $150.00 should begin in the month of July, 1971.

Section D. LABORERS' AND RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND

ANNUITY AND BENEFIT CLASSIFICATION FOR BOARD OF EDUCATION LUNCHROOM ATTENDANTS

(President, Laborers' & Retirement Board Employees' Annuity & Benefit Fund—T. A. McG.—September 22, 1967)

We acknowledge receipt of your recent communication requesting an opinion "as to the procedure for us to follow regarding a problem involving Board of Education Lunchroom Attendants."

You state that the position of Lunchroom Attendant has been placed under the classified service by the Civil Service Commission (1967 Classification and Pay Plan, Schedule "A", p. 27, Title Code 277C); that on October 15, 1966, the Commission held a competitive examination for Lunchroom Attendants; that as of May 1967, the Laborers' and Retirement Board Employees' Annuity and Benefit Fund (hereinafter referred to as Laborers' Fund) had approximately 847 Civil Service Lunchroom Attendants and approximately 750 Temporary Lunchroom Attendants contributing into the Laborers' Fund; that when the register resulting from the examination of October 15, 1966, in posted, the names of a large number of Temporary Lunchroom Attendants will be on said register and will be certified therefrom as Luncheon Attendants; and that by reason thereof "many payroll problems can be foreseen due to some Lunchroom Attendants being members of the Municipal Employees' Annuity and Benefit Fund of Chicago."

The pension and annuity rights of those persons who were appointed Lunchroom Attendants and Temporary Lunchroom Attendants prior to the position of Lunchroom Attendant being classified as a civil service position are governed by the statutory provisions pertaining to the Laborers' Fund. Under Section 11-110 of the Laborers' Fund Act (Ill. Rev. Stat. 1965, chap. 108½, par. 11-110), a participant in the Laborers' Fund is:

> "(a) Any employee of an employer in a position classified by the civil service commission thereof as labor service * * *:
>
> * * *
>
> "(e) Any person employed after July 31, 1961, by temporary appointment * * * in a position classified by the Civil Service Commission of the employer as labor service of the employer."

Therefore, all Lunchroom Attendants and Temporary Lunchroom Attendants were participants in the Laborers' Fund prior to the classification of the Lunchroom Attendants as a classified position by the Civil Service Commission.

Section 11-221 of the Laborers' Fund Act (Ill. Rev. Stat. 1965, chap. 108½, par 11-221) provides in part as follows:

> "(a) Any contributor becoming employed on or after the effective date (except a participant in any other annuity, retirement or pension fund in operation in such city) shall be subject to the provisions of this Article. *Any such contributor shall continue as a contributor to this fund, in the event that he shall be employed by an employer in any capacity,* other than as a member of the police department, or as a member of the fire department as as a public school teacher." (Emphasis added.)

From the foregoing, it is apparent that those Temporary Lunchroom Attendants who did take and do pass the examination of October 15, 1966, and are certified to the civil service position of Lunchroom Attendant will continue to be contributors to the Laborers' Fund and their payroll and pension fund deductions will continue as in the past.

All other persons certified from the Lunchroom Attendants' register, resulting from the examination of Ocober 15, 1966, and all Temporary Lunchroom Attendants hereafter appointed will be civil service employees of the Municipal Employees', Officers' and Officials' Annuity and Benefit Fund (hereinafter referred to as Municipal Fund). Secion 8-113 of the Municipal Fund (Ill. Rev. Stat., chap. 108½, par. 8-113) provides that a participant in the Municipal Fund is:

"(a) Any employee of an employer employed in the classified civil service thereof other than by temporary appointment as defined by the Civil Service Act.

* * *

"(d) Any person employed after December 31, 1949, in the service of the employer by temporary appointment as defined in Section 10 of the Civil Service Act, who meets the following qualifications:

(1) has rendered service during not less than 12 calendar months * * * 4 months of which must have been consecutive full normal working months of service rendered immediately prior to filing application to be included; and

(2) files written application with the board, while in the service, to be included hereunder."

Therefore, any employee in the position of Lunchroom Attendant, who was not a participant in the Laborers' Fund prior to said employment, would be a contributor to the Municipal Fund and any Temporary Lunchroom Attendant, who was not a participant in the Laborers' Fund prior to said employment, would be a participant in the Municipal Fund, provided however, he complies with the provisions of Section 8-113(d) of the Municipal Fund Act.

Summarizing the foregoing, it is our opinion that all Lunchroom Attendants and Temporary Lunchroom Attendants who were participants in the Laborers' Fund prior to the classification of Lunchroom Attendants as a civil service position, would continue to pay into the Laborers' Fund; and that all Lunchroom Attendants and Temporary Lunchroom Attendants appointed subsequent to the classification of Lunchroom Attendants as a civil service position are participants in the Municipal Fund subject to the conditions of Section 8-113 of the Municipal Fund Act.

RIGHT TO BENEFITS OF EMPLOYEE WORKING WITHOUT CIVIL SERVICE STATUS

(Laborers' and Retirement Board Employees' Annuity and Benefit Fund —T. A. McG.—January 31, 1968)

In response to your request for an opinion as to whether JOHN E. WAGNER, who worked under the name of ARTHUR F. RYAN, is entitled to receive annuity benefits from the Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago, the following is submitted:

Your letter states and your records indicate that John E. Wagner began working for the City of Chicago about the year 1932; that at the time he started to work for the City, he worked under the certification and name of his brother-in-law, Arthur F. Ryan; that he never took a Civil Service Examination, and that he continued to work in this position until November, 1966, at which time, a leave of absence was signed.

Your letter further indicates that during all of this time he worked under the name of his brother-in-law, Arthur F. Ryan.

Your records further indicate that John E. Wagner was not entitled to be a Civil Service employee for the City of Chicago; that he took his brother-in-law's job and worked under his brother-in-law's name; and that he did not, at

any time, take or attempt to take any Civil Service Examination so that he might be certified as a Civil Service employee.

Your letter further indicates that on April 6, 1967, an annuity application was submitted to your office marked John E. Wagner, alias Arthur F. Ryan, born July 5, 1906, unmarried, 914 West 52nd Street, Chicago, Illinois.

Your records also indicate that the brother of John Wagner wrote that the original Arthur F. Ryan worked for the City of Chicago from the date of his certification, July 3, 1925, to November 30, 1925, when he was layed off, and that John E. Wagner worked under the name of his brother-in-law, Arthur F. Ryan, from November 23, 1932, to his discharge on December 31, 1932, and from October 11, 1933, to November 15, 1966, at which time a leave of absence was signed. No resignation has been signed as of June 12, 1967, in the Department of Water and Sewers, Water Distribution Division.

It would follow from the evidence adduced from the records of your file that any deductions made from the salary of John E. Wagner, while working under the name of Arthur F. Ryan, were deductions made in error; that John E. Wagner was not entitled to be a Civil Service employee in the City of Chicago; that he took his brother-in-law's job and worked under his brother-in-law's name; and that he did not, at any time, take or attempt to take any Civil Service Examination so that he may be certified as a Civil Service employee; nor was he ever certified by being on any Civil Service list.

We are, therefore, of the opinion that inasmuch as John E. Wagner was not entitled to the position that he held in the service of the City of Chicago, that any deductions made from his salary and paid into your Fund were deductions in error. We are also of the opinion that all such deductions made in error should be refunded to John E. Wagner.

CONFLICTING CLAIMS TO BENEFITS—PROCEDURE

(Secretary, Laborers' Retirement Board—S. R. D.—May 3, 1971)

We acknowledge receipt of your recent communication relative to the above-captioned matter, in which you request our opinion as to the respective rights of Ella Barnes, Rebecca Dolgia Barnes and the children of Ella and Phillip Barnes to the benefits accruing by reason of the death of Phillip Barnes.

Section 11-192 of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund—Cities Over 500,000 Inhabitants (Ill. Rev. Stat., 1969, chap. 108½, par. 11-192) provides as follows:

> "To authorize or suspend the payment of any annuity or benefit in accordance with this Article. The board shall have exclusive original jurisdiction in all matters relating to or affecting the fund, including, in addition to all other matters, all claims for annuities, pensions, benefits or refunds."

Section 11-196 of the Act provides as follows:

> "To compel witnesses to testify before it upon any matter concerning the fund and allow witness fees not in excess of $6 per day. The president or other members of the board may administer oaths to witnesses."

Section 11-231 of the Act provides as follows:

> "The provisions of the 'Administrative Review Act', approved May 8, 1945, and all amendments and modifications thereof, and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of final administrative decisions of the board provided for under this Article. The term 'administrative decision' is as defined in Section 1 of such Act."

There appear to be conflicting claims of Ella Barnes, Rebecca Dolgia Barnes and the children of Ella Barnes and Phillip Barnes. We recommend, therefore, that a hearing be held by the Retirement Board in accordance with the above-quoted statutory provisions. We suggest the following procedure:

1. Serve notice, by certified mail, on all interested parties at least 15 day prior to the date set for the hearing, setting forth the time, place and subject matter of said hearing.

2. At the hearing the numerous claimants and witnesses should be permitted to testify, under oath, in the presence of the members of the Retirement Board. The Board should interrogate the various witnesses to ascertain the individual or individuals entitled to an annuity or refund of the fund in the name of Phillip Barnes. This hearing should be public and a stenographic report made thereof.

3. The Board should render its decision in writing, based upon the evidence heard at the hearing, as to who is entitled to the benefits accruing by reason of the death of Phillip Barnes.

4. Each of the interested parties should be served, by certified mail, with a copy of said decision.

CHAPTER IV—RELATION OF CITY WITH OTHER GOVERNMENTS

Section A. FEDERAL RELATIONSHIP

FEDERAL AVIATION ADMINISTRATION— ANTI-DISCRIMINATION REVIEW

(Commissioner of Aviation—W. R. Q.—January 5, 1973)

This letter is in response to your inquiry of December 6, 1972 regarding the power of the Federal Department of Transportation to conduct a review of the City of Chicago's programs and activities that involve Federal Contracts.

Title 42 United States Code Section 2,000 e-2 provides that: "(a) it shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

In March of 1972, Title 42 was amended so that the term "employer" now includes governmental employers such as the City of Chicago. P.L. 92-261, Sec. 2.

In order to implement these statutes, the President issued Executive Order Number 11246, which proscribes discrimination in employment by Government contractors and subcontractors and provides certain required provisions for every contract entered into by the Federal Government. In substance the provisions require that every government contractor affirmatively agree to refrain from discriminating against any employee or applicant for employment on grounds of race, color, religion, sex or national origin. Additionally the Executive Order requires every contractor to file compliance reports with the contracting agency or the Secretary of Labor as may be directed. The order further specifies that each contracting agency is primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors.

Part 21 of Title 49 of the Code of Federal Regulations are regulations promulgated by the Department of Transportation. These regulations comply with the Department's responsibility imposed by Executive Order 11246. Under the regulations, the Secretary of Transportation has a right to receive records and reports so that he may determine whether there have been any acts of discrimination under a program supervised by the Secretary of Transportation. The Secretary also has the authority to require such reports as are necessary to enable him to carry out his obligations.

The net effect of all of these regulations, orders, and statutes is that the Department of Transportation has the right to hold a compliance review of the Chicago Department of Aviation. The review may cover all facets of employment, in which an individual's race, color, religion, sex, or national origin may be a basis for discrimination.

Therefore, in answer to your question I would suggest that you cooperate with the Department of Transportation in their compliance review and compile such records as they might reasonably require for their review.

APPLICATION OF THE FEDERAL FAIR LABOR STANDARDS ACT

(Commissioner, Department of Streets and Sanitation—S. R. D.— June 8, 1970)

We acknowledge receipt of your recent communication together with a letter addressed to you from the System Auto Parks and Garages, Inc. and dated May 15, 1970.

The letter from the System Auto Parks and Garages, Inc. states that they operate Parking Facilities No. 2 and No. 3; that the United States Department of Labor claims the System Auto Parks and Garages, Inc. comes under the provisions of the Federal Fair Labor Standards Act, and that suit has been filed against the System Auto Parks and Garages, Inc. seeking back wages for attendants for the years 1967, 1968 and 1969, totalling approximately $12,500 at Facility No. 2 and approximately $15,700 at Facility No. 3. The letter asks you to advise and possibly help the System Auto Parks and Garages, Inc. in the matter and suggests that maybe the Corporation Counsel can be of some aid in working out a settlement in the matter.

Also attached to your letter is a Xerox copy of a letter from this office, dated July 22, 1969, in which it is stated:

> "Whether the operator and the employees of a certain municipally-owned parking facility are under the provisions of the Fair Labor Standards Act is a question to be determined, in the first instance, by the operator and the United States Department of Labor.
>
> "If it is determined that the operator and the employees of a particular City Parking Facility come under the provisions of the Fair Labor Standards Act, we are of the opinion that a determination of whether the overtime paid by the operator to its employees, under the provisions of the Act, is a reimbursable expense, under the provisions of the contract between the operator of the parking facility and the City, should remain in abeyance until the accounting provided for in Article XIX of the contract."

We see no reason to modify the foregoing conclusion and, therefore, we are of the opinion that it would not be expedient for this office to aid in attempting to settle the matter and, also, it would not be necessary for your office to take any steps relative to the pending litigation between Government and the System Auto Parks and Garages, Inc.

FEDERAL GOVERNMENT IMMUNITY FROM REGULATORY PROVISIONS OF THE MUNICIPAL CODE

(Assistant Commissioner of Buildings—R. N. K.—September 3, 1968)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, has been referred to the undersigned for response. You refer us to a letter from the Chicago Regional Office of the Post Office Department wherein the writer refused to authorize payment for semi-annual inspection fee of the elevators at the Air Mail Facility at O'Hare International Airport. You request an opinion as to whether the Federal Government is immune from the regulatory provisions of the Municipal Code of Chicago, and specifically the elevator code.

In *United States* v. *Mayo*, 47 F. Supp. 552 (1942), cited by the Post Office Department, the court held at page 556:

> "It seems to well settled as a matter of law that the police power of a State does not extend to the United States, its property or transactions, and that

such Federal property and transactions are immune from State regulations, and State Statutes are invalid under the Supremacy Clause of the Constitution. (Article VI, Clause 2.)"

In *Thiele* v. *City of Chicago,* 12 Ill. 2d 218 (1957), an action was brought to enjoin the City of Chicago from enforcing its licensing, building and zoning ordinances against plaintiffs in the operation of their food store situated on land ceded to the United States by the State of Illinois.

In affirming the decree of the Superior Court of Cook County the court held that buildings under Federal Government control are not subject to the provisions of the Municipal Code of Chicago.

In light of the foregoing, we are of the opinion that the Federal Government is immune from the regulatory provisions of the Municipal Code of Chicago, including the elevator code contained therein.

This opinion is in accord with an opinion rendered by this office to the General Service Administration, where we held that Federal Government owned buildings and the boilers located therein are exempt from the boiler regulations of the Municipal Code of Chicago, *25 Opinions of the Corporation Counsel,* 202.

FEDERAL LOAN FOR URBAN RENEWAL

(T. A. F.—November 24, 1967)

OPINION AND CERTIFICATE OF LOCAL PUBLIC AGENCY'S ATTORNEY

1. I the undersigned Attorney for the City of Chicago (herein called the "Local Public Agency") have examined the records of all of its proceedings relative to the issuance of its Project Temporary Loan Note No. 3 in the amount of $1,301,000.00 in connection with Project No. Ill. R-43, said Note being one of an authorized issue of $3,186,005.00 aggregate principal amount of such Notes which are authorized to be outstanding at any one time. I have also examined said Note as executed on behalf of the Local Public Agency. Said Note, together with interest thereon, is payable to the United States of America or order on demand, bears interest at the rate of four and one eighth per centum (4⅛%) per annum, is dated the 12th day of December 1967, is issued pursuant to an ordinance adopted by the Local Public Agency on the 17th day of June, 1966, covering the aforesaid authorized issue, and an ordinance likewise adopted on the 17th day of June 1966, providing for the execution of the aforesaid note and the delivery thereof in escrow to the United States of America to be held and paid for by the latter in accordance with the terms and conditions contained in the Requisition Agreement referred to in the latter ordinance. Said Note is also issued pursuant to the following constitutional and statutory authority.

State of Illinois—Urban Renewal Consolidation Act of 1961 (Illinois Revised Statutes, 1965, Chapter 67½, Sections 91.101-91.136)

2. IT IS MY OPINION THAT

(a) Said proceedings have been taken, said ordinances have been adopted, and said Note has been executed on behalf of the City by its proper officials, in form, manner and otherwise as authorized by law;

(b) Said Note, when the United States of America shall have accepted delivery thereof, made payment therefor, and duly executed the legend appearing at the foot thereof, will be a valid and legally binding obligation of the City of Chicago payable and secured in accordance with the terms thereof.

3. I HEREBY CERTIFY THAT:

(a) None of said proceedings and no authority for the execution, issuance, and delivery of said note have or has been repealed, rescinded or revoked, and said ordinances are in full force and effect.

(b) No litigation of any nature is now pending or threatened (either in State or Federal Courts) restraining or enjoining the execution, issuance, or delivery of said Note, or in any manner questioning or affecting the validity or security of said Note or the validity of said proceedings.

(c) In the past six months no legislation has been enacted by the General Assembly of the State of Illinois which affects the power or authority of the Local Public Agency to finance, undertake or carry out the aforesaid Project, or its right to issue said Note or any other notes of the aforesaid authorized issue or to make provision for the payment therefor in accordance with the laws pertaining thereto, or which changes the organization of the Local Public Agency, or of its governing body, or the method of appointment or selection thereof.

WITNESS my hand this 28th day of November, 1967.

NEIGHBORHOOD FACILITIES GRANT

(Regional Administrator, Department of Housing and Urban Redevelopment R. F. S.—December 11, 1967)

I am an attorney at law admitted to practice in the State of Illinois.

As Corporation Counsel for the City of Chicago, I have reviewed its Application for Neighborhood Facilities Grant under Section 703 of the Housing and Urban Development Act of 1965, and accompanying documentation. I have also made an examination of all pertinent Federal, State and local laws which relate to the Neighborhood Facilities Grant applied for and to Applicant's eligibility to receive and expend such grant for the purposes indicated in its Application and its legal capacity to agree to the terms and conditions imposed by the Federal Government for the making of the grant.

The proposed Garfield Park Community Service Center is located within a duly designated study area of the Department of Urban Renewal of the City of Chicago, being designated "The East Garfield Park Study Area" which is bounded generally by West Warren Boulevard and the alley south of West Warren Boulevard on the north; South Sacramento Boulevard on the east, the Eisenhower Expressway on the south and South Homan Avenue on the west. Therefore, since the proposed facility is located within an urban renewal project area, the authority of the City of Chicago, in addition to its general municipal power, is pursuant to the Housing and Redevelopment Act, Chapter 67½ Illinois Revised Statutes. The special authority of the City of Chicago to borrow money and receive loans and grants from the Federal Government is contained in Chapter 67½, Section 91.124(c):

"To borrow money, to apply for and accept advances, loans, grants, contributions, gifts, services, or other financial assistance, from the United States of America or any agency or instrumentality thereof, the State, County, Municipality, or other public body or from any sources, public or private, for or in the aid of any of the purposes of this Act, ..."

Chapter 67½, Section 91.101 through 91.136 grants to the City of Chicago the power to acquire land for the proposed facility and to develop, own and operate the said facility which will aid in the development and accomplishment of the proposed urban renewal project. Chapter 67½, Section 91.125 provides specifically that the City of Chicago may provide for a public facility: "cause public buildings and public facilities, including recreational, community, or educational facilities, or any other works which it is otherwise empowered to undertake to be furnished; and cause administrative and other services to be furnished to a Department as agent of the municipality."

Chapter 67½, Section 91.125(c) provides as follows:

"For the purpose of aiding in the planning undertaking or carrying out of a redevelopment project or a conservation area, a municipality may (in

addition to its other powers and upon such terms with or without consideration, as it may determine) do and perform any and all actions or things, which, by the provisions of subsection (a) of this section, a public body is authorized to do or perform, including the furnishing of financial and other assistance."

Based upon the foregoing, I am of the opinion that the City of Chicago is fully empowered under law to receive and expend Federal, State and local funds; to contract with the United States of America for the purpose of receiving a grant under Section 703 of the Housing and Urban Development Act of 1965; to develop, own and operate the Neighborhood Facilities to be provided with such grant assistance; and to do any and all other things necessary for the successful completion of the Neighborhood Facilities Project.

To the best of my knowledge, there is no pending or threatened litigation of any kind concerning the above referenced project.

APPLICATION OF PARKING TAX ORDINANCE TO THE F B I

(City Collector—G. F. H.—June 28, 1972)

With reference to the inquiry of Roy K. Moore, Special Agent in Charge, United States Department of Justice, Federal Bureau of Investigation, regarding the applicability of the Chicago Parking Tax Ordinance (Chapter 156.1-1, et seq.) to the F.B.I.'s fleet of vehicles used for official business only and stored on a monthly basis in various Loop garages, this office is of the opinion that the tax does not apply to the parking of these vehicles, since any property or instrumentality of the United States cannot be taxed by other units of government unless Congress consents. See 84 C.J.S. Taxation, sec. 188. This fundamental exemption is founded in the supremacy clause of the United States Constitution and any attempt by a state or local government to impose or enforce such a tax without the consent of Congress would be unconstitutional. Thus this federal exemption exists at all times in the absence congressional action to the contrary, and the presence or absence of express exemptions for the federal government in state or local tax enactments is in no way determinative of the immunity of the United States from such state or local taxation.

Any evidence that the parking rental is sought by the United States government by or through any of its agents or agencies is sufficient to establish the federal exemption, such as a lease to that effect, recordation of official governmental license plates or whatever other evidence will satisfy our office that the United States governmental exemption must apply.

Section B. CHICAGO PARK DISTRICT

FENCE MAINTENANCE—LAKE SHORE DRIVE

(Commissioner of Streets and Sanitation—A. H.—June 27, 1969)

Your request addressed to Corporation Counsel Raymond F. Simon, seeking to be advised as to your legal responsibilities concerning the maintenance of fencing along Lake Shore Drive and maintaining other appurtenances located adjacent to the roadway proper, has been referred to the undersigned for consideration and response.

You state that with the park consolidation and the assumption by the City of Chicago of boulevards for maintenance and operation, you find no specific agreement as to the City's responsibility for maintaining appurtenances away from the roadway proper, with the exception of street lighting.

We refer you to Section 2 of an Act in relation to the exchange of certain functions, property and personnel among cities and park districts (Ill. Rev. Stat. 1967, ch. 105, par. 333.52), which provides, in part, as follows:

> "On the effective date, the title to, control and jurisdiction of all park district boulevards, boulevard appurtenances, and park district street maintenance equipment, shall be vested in the city. On that date the city shall assume responsibility for the supervision, maintenance and repair of such boulevards and *boulevard appurtenances* and for their policing and traffic regulation and control . . . ." (Emphasis supplied.)

In Section 1(d) of the Act, (Ill. Rev. Stat. 1967, ch. 105, par. 333.51) the following definition having application to the instant problem may be found:

> "(d) *'Boulevard appurtenances'* means parking meters, light posts and facilities used for lighting boulevards, traffic signs and signals." (Emphasis supplied.)

From the foregoing, it may at once be seen that fences are not expressly included within the definition of boulevard appurtenances vested in the City under the exchange of function Act; however, you do not describe the nature of the fencing to which you have reference. If the fencing is strictly a park and recreational function for the purpose of adding to and furthering enjoyment of the park, it would obviously not be within contemplation of the above-cited statutory provisions; if the fencing is for the purpose of preventing snowdrifts from accumulating on the thoroughfare pavements, however, it would seem that the better view would be to include the maintenance of said fencing within the contemplation of the City's responsibility since it would directly affect traffic regulation and control on said boulevards.

Your letter makes reference to a specific agreement as to the City's responsibility in this matter; we have found no agreement between the City and Park District aside from the statutory provisions above quoted regarding this situation. Should you find such an agreement, we will be glad to furnish legal construction of the language therein contained.

OPERATION OF FOOD CONCESSIONS IN GRANT PARK

(General Attorney, Chicago Park District—M. E. A.—October 17, 1967)

Reference is made to your letter of August 16, 1967 in which you request our opinion as to whether the Chicago Park District can contract to permit food concessions to operate in the premises of Grant Park. You indicate that these concessions will not operate on the streets or sidewalks in the park area. It is also assumed that these concessions are not operating immediately adjacent to the streets and sidewalks in a manner which would cause customers to spill-over into these streets and sidewalks, thereby making the streets and sidewalks a part of the concession operation.

You attach with your letter an opinion of June 17, 1965 of this office in which we concluded that food concessions are precluded from operating on the sidewalks of Grant Park pursuant to section 36-49.1 of the Municipal Code of Chicago.

Section 7 of the Chicago Park District Act (Ill. Rev. Stat. 1965, ch. 105, § 333.7) reads in part as follows:

> "(T)he city shall exercise the power to operate, maintain and govern boulevards, driveways, roadways and highways used as thoroughfares for vehicular traffic into or within parks. . . ."

Section 7.02 of the Chicago Park District Act (Ill. Rev. Stat. 1965, ch. 105, § 333.7-02) provides in part as follows:

> The commissioners of the Chicago Park District, except as otherwise herein provided, may from time to time establish by ordinance all needful rules and regulations for the government and protection of parks, boulevards and driveways and other property under its jurisdiction and provide penalties not exceeding $200.00 for any one offense for violation of such rules and regulations. The City may exclude all objectionable travel and traffic and may make and enforce reasonable traffic and other regulations and provide penalties not exceeding $200.00 for any one offense for the violation of such rules and regulations.

Section 7 and 7.02 set forth divided authority for enacting ordinances pertaining to the parks in Chicago. The City of Chicago is authorized to regulate the public ways within the parks. However, park property other than the public ways appears to be left to the regulation of the Chicago Park District. For this reason, our 1965 opinion referred to above correctly concluded that food concessions could not operate on parks streets and sidewalks in violation of section 36-49.1 of the Municipal Code of Chicago.

Sections 7 and 7.02 of the Chicago Park District Act, as noted above, authorize the Chicago Park District to enact ordinances pertaining to non-sidewalk and non-roadway park areas. The Legislature has not afforded the City of Chicago current authorization to do this. Therefore, in our opinion Chicago Park District ordinance 17-13 is controlling. This ordinance reads as follows:

> "No person shall offer or expose for sale any article or thing, or do any hawking, peddling or soliciting, or buy or offer to buy any article or thing, or take up any collection or solicit or receive contributions of money or anything of value in the park system, except when authorized so to do by permit from or contract with the board of commissioners."

The preamble to the Chicago Park District Ordinances contains an excerpt from our letter of July 28, 1960 which reads in part "The violator can be charged with violation of the Chicago Park District ordinance and the City of Chicago ordinance even though they be identical or similar ordinances; further, if a statute of the State of Illinois is identical or similar, he can be charged with this third charge." This excerpt, of course, assumes the dual authority of the Chicago Park District and the City of Chicago to regulate the same phase of park activity. It further assumes no conflict between the two types of regulation. However, there is a conflict between the Chicago Park District Ordinance 17-13 and section 36-49.1 of the Municipal Code of Chicago. Moreover, sections 7 and 7.02 of the Chicago Park District Act, cited above, clearly set forth a division of authority to enact ordinances regulating the park district. It will be noted that sections 7 and 7.02 were enacted on August 23, 1963, three (3) years subsequent to the date of our excerpt opinion above.

The concessions in question, by virtue of Chicago Park District Ordinance 17-13, are exempt from the prohibition of section 36-49.1 of the Municipal Code of Chicago. The operation of these concessions, however, must be in accordance with the Rules and Regulations For Sanitary Control of Food and Handling adopted by the Board of Commissioners of The Chicago Park District on May 23, 1950 (See Journal of Proceedings of the Board of Commissioners of the Chicago Park District of May 23, 1950, p. 52).

Because of the foregoing, not withstanding our letter of June 17, 1965, it is our opinion that your contracts authorizing food concessions in Grant Park in the manner as described in your letter are permissible under law.

JURISDICTION OVER PARKS AND RECREATION AREAS

(Assistant Metropolitan Attorney, Metropolitan Government of Nashville and Davidson County—D. P.—September 27, 1967)

Your recent letter addressed to the "City Attorney" has been received by this office and referred to the undersigned for reply. You ask for a copy of the rules and regulations governing our parks and recreation areas.

The public parks and recreation areas in Chicago come under the jurisdiction and control of the Chicago Park District, Administration Building, 425 E. 14th Street, Chicago, Illinois. We are referring a copy of your letter to Mr. David S. Kerwin, General Attorney for the Chicago Park District who can supply you with the material you desire.

Section C. CHICAGO HOUSING AUTHORITY

URBAN RENEWAL—APPRAISAL REPORTS

(Commissioner, Department of Urban Renewal—E. L. N., R. F. S.—November 19, 1968)

We recommend that the appraisal report form referred to above and now in use in conjunction with Urban Renewal Projects be revised in accordance with Exhibit A attached hereto.

It is the opinion of the Corporation Counsel's office that the appraisal form heretofore used in connection with Urban Renewal Projects does not conform with the Illinois law and, therefore, should be revised.

Although our office has been aware of the legal impediment in utilizing the referenced appraisal form, this matter was previously not significant in that pursuant to *City of Chicago* vs. *Harrison-Halsted Building Corp.*, 11 Ill. 2d 431, 143 NE 2d 40, the appraisals were not subject to discovery and, therefore, were never produced for inspection by the opposing counsel. Subsequent to the landmark "discovery" case of *Monier* v. *Chamberlin*, 31 Ill. 2 400, the Court has reassessed its position concerning the confidential nature of the condemnor's appraisals, and has ruled that appraisals are in fact subject to discovery and must be produced. *City of Chicago in Trust for the Use of Schools* v. *Schorsch Realty Co.*, 95 Ill. App. 2d 264; *Department of Public Works* v. *Oberlander*, 92 Ill. App. 2d 174; *United States of America* v. *Meyer*, C.C.A. 9th Circ. No. 21, 127, July 1968.

The legal objection to the form presently being used is that the appraiser is required to separate the value of land and the value of the building and add the two together in order to reach his opinion of the fair cash market value. *City of Chicago* v. *Callender*, 396 Ill. 371, at page 381, states:

> "The value of buildings may be considered only insofar as it affects the value of the land. The building may not be valued separately. *The Department of Public Works and Buildings* v. *Hubbard*, 363 Ill. 99."

It is abundantly clear that Illinois law follows the "Unit Rule" which provides that property must be considered as a single entity and that an appraiser cannot value the buildings separately from the land. It should also be noted that if the basis of an appraisal considers improper elements, the testimony of the appraiser would be inadmissible and subject to being stricken. Chicago Land *Clearance Commission* v. *Darrow*, 12 Ill. 2d 365.

Our office, therefore, recommends that Page 1 of the appraisal form be revised in accordance with the attached Exhibit, which eliminates the separation of the value of land and building. It should be noted, however, that in the body of the appraisal considering the replacement cost approach, land value is delineated. If such a value is necessary for bookkeeping purposes, it can be obtained from the total appraisal report.

ARREST POWERS OF CHA GUARDS

(Chairman, Chicago Housing Authority—M. E. A.—June 9, 1969)

Reference is made to your inquiry at the meeting in the Mayor's office this morning in regard to the arrest powers of Chicago Housing Authority guards who have been deputized by Superintendent of Police, James B. Conlisk, Jr. as "special policemen".

Please be advised that Section 173-11 of the Municipal Code of the City of Chicago provides: "Special policemen shall possess all the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged."

This means that these "special policemen" have within Chicago Housing Authority's facilities the same arrest powers as Chicago police officers. These powers are set forth in the Illinois Criminal Code (Ill. Rev. Stat. 1967, Ch. 38, § 107-3) as follows:

"A Peace officer may arrest a person when:

(a) He has a warrant commanding that such person be arrested; or

(b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another jurisdiction; or

(c) He has reasonable grounds to believe that the person is committing or has committed an offense."

RELOCATION PAYMENT FOR REPLACEMENT HOUSING

(Assistant Regional Administrator for Housing Management and Community Services, Department of Housing & Urban Development—E. L. N.—September 17, 1971)

As you are aware, the above referenced Act entitles displaced persons to receive a relocation payment for replacement housing.

In a number of instances, the relocatees have purchased homes outside of the State of Illinois. It is necessary, in order to determine eligibility, for the local Public Agency to obtain an opinion of counsel regarding the sufficiency of title with respect to the replacement housing. Since the property is in some instances beyond the territorial limits of the State of Illinois, it is impossible for our office to render such an opinion.

We propose that where the property is outside of the State of Illinois, that the owner obtain an opinion of counsel submitted by an attorney duly licensed to practice law in the State where the property is located, indicating the status of the title.

We hereby request your approval of the foregoing procedure.

Since a number of payments are being held pending a resolution of this problem, your prompt attention will be appreciated.

CONCILIATION AGREEMENTS—PROCEDURE

(Assistant City Counselor, Kansas City, Mo.—C. J. O'C—February 20, 1969)

Your letter addressed to the Corporation Counsel of the City of Chicago has been referred to the undersigned for reply. We have transmitted your letter to the Chicago Commission on Human Relation and have requested them to forward to you a copy of our Fair Housing Ordinance, the procedural rules of the Commission, and copies of Conciliation Agreements used by the Commission.

An examination of these Conciliation Agreements will reveal that they are drafted with regard to the particular violation charged, are binding on the parties, and provide that the matter may be re-instated upon breach of the conciliations. I suggest that since these hearings are often bitter and emotional, a formal document will resolve the matter by restoring the dignity of the person claiming to have been discriminated against. Further, the document spells out the obligations of the broker or individual offender and attempts to attain the public policy set forth in the preamble to your Ordinance.

It is our opinion that a mere apology by the alleged offender would satisfy neither public policy nor the person offended. Without some satisfaction offered to the aggrieved party, conciliation would be impossible.

We have found that three attorneys provided by the American Arbitration Commission and paid a per diem by the Commission have been successful in bringing the parties together. This success comes from the actual experience they gain from presiding over Conciliation Conferences. The terms of the Conciliation Agreement is negotiated between the parties and the Conciliator. The Agreement is then approved or disapproved by the entire Human Relation Commission.

We hope our comments will aid you. If you have any additional inquiries, we will attempt to answer them.

NUMBER OF MEMBERS CONSTITUTING A QUORUM FOR CONSERVATION COMMUNITY COUNCILS

(Deputy Commissioner, Department of Urban Renewal—H. A. T.—February 10, 1970)

On May 13, 1969 the Englewood Conservation Community Council adopted a Resolution to amend Article 3, Section 4 of its By Laws, as follows:

> *Quorum:* A majority of the members of the Council shall constitute a quorum to transact business and no vacancy shall impair the right of the remaining members to exercise all the powers of the Council, and every action of the Council approved by a majority of the members present shall be deemed to be the action of the Council; provided that not less than 7 members shall constitute a quorum.

The question has been raised as to the legal validity of this amendment. The Englewood Conservation Community Council derives its authority from the Urban Renewal Community Conservation Act of 1953, and the Urban Renewal Consolidation Act of 1961. The pertinent part of Section 91.121 of the Urban Renewal Consolidation Act (Chap. 67½ Ill. Rev. Stats.), which reads the same as the former Urban Renewal Community Conservation Act, provides:

> The Department shall nominate and the presiding officer shall appoint no less than nine nor more than fifteen residents of each conservation area designated by the Department to serve as a "Conservation Community Council" for their

respective areas. One member of each such council shall be designated as Chairman by the presiding officer . . . Members shall serve without pay and shall be eligible to succeed themselves. A member shall hold office until his successor shall have been appointed and qualified. No member of a council may hold public or political party office during his period of membership. A majority of each council created must be the legal or equitable owners of real property located within their respective conservation areas. A majority of the members of each council shall constitute a quorum to transact Business and no vacancy shall impair the right of the remaining members to exercise all the powers of each council, and every action of a conservation community council approved by a majority of the members present shall be deemed to be the action of the conservation community council; *provided that not less than five members shall constitute a quorum.*

You will note that amending the By Laws by requiring a quorum to be not less than 7 members is in direct contradiction to the legislative act which created the Council. Section 91.135 of said Act provides for a liberal construction to effectuate the provisions thereof. However, it is Hornbrook law that a "liberal construction" cannot change the language specifically spelled out in a statute.

McQuillin on Municipal Corporations, Vol. 2, Sec. 10.27 states that, where the legislature, in granting a power, sets forth the procedure to be followed, in effectuating such power, the procedure must be followed. Cited: City of East St. Louis vs. Whorung, 50 Ill. 28, and Fisk vs. City of Worcester, 106 Northeastern 1025.

It is our opinion that the amendment of Article 3, Section 4 of the By Laws of the Englewood Conservation Community Council changing the number constituting a quorum from not less than 5 members to not less than 7 members, is void.

REQUIREMENTS FOR COVENANTS TO RUN WITH THE LAND

(Commissioner, Department of Urban Renewal—H. A. T.—July 24, 1967)

This is a supplement to our opinion of July 19, 1967, concerning Planned Developments, based upon additional facts.

The Department of Urban Renewal of the City of Chicago, as the owner of Disposal Parcel HR-2 in Project Hyde Park-Kenwood, has contracted to sell the same. In connection therewith, the Department of Urban Renewal is sponsoring an application for a Planned Development for said disposal parcel and contiguous land owned by the Vendee.

The Department of Urban Renewal required a provision in its land sales contract with the Vendee (Redeveloper) that the land presently owned by the Redeveloper and included in said Planned Development, come under the same restrictions of the Planned Development as the land to be conveyed to it by the Department of Urban Renewal.

The legal description of the land owned by the Redeveloper was recited in the land contract and will be received in the conveyance. The Deed will recite that the provisions of the Planned Development, in addition to other covenants, are covenants running with the land, and will continue until November 7, 1998.

The question propounded is whether the Redeveloper can subject land not included in a conveyance to a covenant running with the land. The basis for the question is an old principle of law that such covenants required a privity of estate, as well, as a privity of contract. This principle has been refuted in Illinois.

It is the opinion of the Corporation Counsel that a contractual obligation subjecting property to a covenant can create a binding covenant running with the

land without a privity of estate. See *Wigmann* v. *Kusel,* 270 Ill. 50; *Hartman* v. *Wells,* 257 Ill. 167.

Said covenants can be effectively used in the contract with the Redeveloper and in the Deed conveying land to the Redeveloper to provide specific strictures and controls over the property to be redeveloped.

CHICAGO FAIR HOUSING ORDINANCE—APPLICATION

(Chairman, Commission on Human Relations—H. N. L.—May 11, 1972)

This letter is in response to your letter of April 28, 1972, requesting an opinion as to the applicability of the Chicago Fair Housing Ordinance (Municipal Code of the City of Chicago, Section 198.7-B) to persons or firms dealing in real estate who are not real estate brokers.

Late last year the case of *209 Lake Shore Drive Building Corp.* v. *City of Chicago,* Ill. App. Ct. No. 54616 (Dec. 2, 1971), was handed down by the Illinois Appellate Court for the First District. In that case the court held that the 1968 amendment to the Chicago Fair Housing Ordinance (which made it unlawful for any owner, managing agent, other person or corporation having the right to sublease any housing accommodation to engage in discriminatory housing practices) was void because it was passed almost a year before the state statute came into effect that gave the City of Chicago the power to regulate housing accommodations to prevent discrimination. The court recognized that under the 1870 Constitution the City of Chicago only had those powers that were expressly delegated to it by the State Legislature. Hence, without the statutory authority to regulate housing, the amendment to the Fair Housing Ordinance would be ineffectual. Furthermore, the power to regulate housing could not be obtained from other grants of power such as police protection and public order. The power, the Court stated, must be received from a specific grant of authority.

The *209* case also held that once the state did give the power to the city to enact ordinances regulating housing, the Fair Housing amendment did not become valid. If it was void when enacted, it would remain void.

Thus, your commission could not take action against individuals under the current ordinance. If the City Council passes a new ordinance including the 1968 amendment, you could enforce it because of two reasons. First, under the 1970 Constitution, the city would have home rule power to pass such an ordinance. Second, even without home rule power, by the fair housing statute (Ill. Rev. Stat. 1971, ch. 24, par. 11-11.1.1) the city was specifically delegated the power to enact ordinances that prohibit discrimination in housing. However, at the present time the City Council has not enacted a new ordinance providing for the situation of which you inquire and, therefore, your commission could not take action against individuals under the current ordinance.

GRANT EARNED WHEN EMINENT DOMAIN PROCEEDINGS ARE INSTITUTED

(Commissioner, Department of Urban Renewal—E. L. N.—November 28, 1969)

In response to your request for an opinion of counsel for an interpretation of the Neighborhood Development Program Funding Agreement which commenced October 1, 1968, between the City of Chicago and the United States of America, hereinafter referred to as the "contract", with respect to the time when the City has taken sufficient action to earn a grant relative to land acquisition, it is our opinion that, pursuant to the Contract, a grant is earned concerning land

acquisition when eminent domain proceedings are instituted to acquire property designated for acquisition in the said contract.

The term of the Contract which commenced October 1, 1968, executed April 30, 1969, was for the "annual increment period", which is defined in the said Agreement in Sec. 512(4), as follows:

> "The term 'annual increment period' means a period of one year (which shall commence on the date set forth in Section 2 of the Funding Agreement) during which the Local Public Agency, in accordance with an approved Expenditures Budget, shall have the right to incur costs and obligations necessary to undertake and carry out Program activities under the Contract;"

The relative provision of the Contract which relates to "costs incurred" is set forth in Section 512(18), as follows:

> "The term 'costs incurred' means recorded by the Local Public Agency as occurring during the annual increment period for goods and services received and for contract work performed (whether paid for or not) during the period:"

A factual summary of the action taken with respect to land acquisition by the City of Chicago, since the date of the execution of the Agreement, can be summarized in the following manner:

The total number of parcels scheduled for acquisition during the term of the Contract is 1,156. It is anticipated that, prior to December 31, 1969, 750 will be acquired. Negotiations will be consummated, or condemnation proceedings instituted for a total of 167 parcels. In summary, the City of Chicago will, prior to December 31, 1969 have acquired 750 parcels and instituted condemnation proceedings for 167 parcels out of a total of 1156 parcels scheduled for acquisition.

It is abundantly clear that the policy of both Department of Housing and Urban Development and the City of Chicago, is to expeditiously acquire property once the area has been duly designated for acquisition to avoid unnecessary hardships upon the owners of the said property. This policy is clearly set forth in the terms of the Contract which provides in Section 201(E):

> *"Compensation of Condemnees.—Acquisition of Program Land by the Local Public Agency and its compensation of condemnees shall be in accordance with the provisions of Section 402 of the Housing and Urban Development Act of 1965 and such regulations, policies and requirements of the Secretary as shall be in effect from time to time."*

In addition to the policy as set forth in the Housing and Urban Development Act of 1965, it is further stated in the Urban Renewal handbook, Chap. 1, Real Estate Acquisition:

> *"TIMING OF LAND ACQUISITION:* Ordinarily land may be acquired as soon as the public hearing on the project has been held, the Urban Renewal Plan has been approved by the governing body of the locality, and the Contract for Loan and Grant has been authorized by HUD. In certain cases, however, HUD may authorize, and provide loan funds to finance, earlier acquisition of land as contemplated by Section 102(a) of the Housing Act of 1949, as amended (see 7228.1. Other Renewal Assistance—Early Land Acquisition.) *After the effective date of the Contract for Loan and Grant, the LPA shall begin land acquisition with the least possible delay."*

It is the opinion of this office that the City of Chicago, once condemnation proceedings have been instituted, has both the legal and moral obligation to:

(1) maintain sufficient funds to pay the judgment entered by the courts and jury for the acquisition of said property; (2) the moral obligation to proceed expeditiously and to promptly pay funds representing the fair cash market value of the property acquired.

The foregoing proposition is not merely a policy which has been enunciated by the United States Government and the City of Chicago, but is also well established in the statutory and case law of the State of Illinois.

The filing of a Petition to Condemn to acquire property for a public purpose vests in the property owner certain legal rights and imposes upon the public body certain legal obligations. The failure of the public body to proceed in good faith to consummate the proceedings, including the deposit of the funds in accordance with the judgment order, may result in a bar to subsequent proceedings and most certainly will obligate the public body to pay the property owner attorney's fees, costs and expenses, incurred as a result of the institution of the eminent domain proceedings.

1. A public body is obligated to pay the costs of attorney's fees and expenses to an owner of property if it abandons the eminent domain proceeding.

Chapter 47, Ill. Rev. Stats. 1967 Sec. 10: ". . . Provided, that if in such case the petitioner shall dismiss said petition before the entry of such order or shall fail to make payment of full compensation within the time named in such order, that then such court or judge shall, upon application of the defendants to said petition or either of them, make such order in such cause for the payment by the petitioner of all costs, expenses and reasonable attorney fees of such defendant or defendants paid or incurred by such defendant or defendants in defense of said petition, as upon the hearing of such application shall be right and just, and also for the payment of the taxable costs."

The court, in *Chicago G.W.R.R.* v. *Ashelford,* 268 Ill. 87, at page 93 states:

". . . The evident purpose of the proviso to said section 10 was to provide for two instances in which the defendant would be entitled to an order requiring the petitioner to pay the expenses incurred by him in making his defense to the petition: First, in case the petitioner should voluntarily dismiss the petition; and second, in case the petitioner should fail to make payment of full compensation within the time named in the order." . . .

Therefore, the owner is vested with the legal right to either have the condemnation proceedings be completed or, in the alternative, to receive his costs in connection with the defense of said proceedings.

2. A public body will be deemed as a matter of law to have abandoned the condemnation if it does not diligently proceed to deposit the funds in accordance with the court order for the acquisition of said property.

In *Forest Preserve District* v. *Kean,* 303 Ill. 293 (1922), the Supreme Court of Illinois held that the failure of the public body to make payment of the award in accordance with the judgment order resulted in an abandonment of the proceedings by the Condemnor.

"The right to enter upon and appropriate to the public use private property does not depend upon an award or judgment fixing compensation but is conditioned upon the payment of such compensation, and the failure to pay deprives the petitioner of any right to the property or its possession and the proceeding is in law considered as abandoned. (*City of Chicago* v. *Barbian,* 80 Ill. 482; *Union Mutual Life Ins. Co.* v. *Slee,* 123 Ill. 57). The right to take the property being conditioned on the payment of the compensation and the payment not having been made within the time limited, the district abandoned the proceeding and had no right afterward to the possession. (*St. Louis and Southeastern R.R. Co.* v. *Teters,* 68 Ill. 144; *Schreiber* v. *Chicago and Evanston R.R. Co.,* 115 Ill. 340)."

3. The filing of the Petition to Condemn fixes the date for valuation.

The Illinois courts have consistently held that the fair cash market value of property acquired through eminent domain proceedings is determined as of the *date of the filing of the petition to condemn.* Forest Preserve District v. Eckhoff, 372 Ill. 391 (1939), at page 395, the court stated:

> "The value of property taken for public use is fixed as of the time of filing the petition in eminent domain. (*City of Chicago* v. *Collin,* 302 Ill. 270; *CITY of Chicago* v. *Farwell,* 286 Ill. 415; *Department of Public Works* v. *McBride,* 338 Ill. 347.)"

In instances where condemnation proceedings are not instituted promptly after the mailing of an offer and after the expiration of a reasonable time for negotiations, a change in condition could result in a hardship to the property owner. In the case of *City of Chicago* v. *Riley,* 16 Ill. 2d 257, the building was destroyed between the time of the offer and the date of the filing of the petition to condemn and the court held that the measure of damages was the market value of unimproved land.

In conclusion, the City of Chicago, by diligently proceeding to acquire the property pursuant to the terms of the Contract, has "costs incurred" since it is legally obligated to pay the owner either, (1) the fair cash market value of the property, or (2) expenses, costs and attorney's fees in the event the acquisition is abandoned. The funds are indeed encumbered once condemnation proceedings are instituted and the grant pertaining to same is earned as of that date.

LOAN APPLICATION—CONFLICT OF INTEREST

(Assistant Commissioner, Department of Urban Renewal—E. L. N.—December 29, 1969)

You presented the question as to whether there is a conflict of interest under the following circumstances:

> Michael Stein was a Rehabilitation Advisor for the Department of Urban Renewal. He resigned, effective June 16, 1969. A Warranty Deed dated May 26, 1969, prior to the date of resignation, was executed by Edith Uitti to Michael Stein, et al, and recorded on June 17, 1969. The property conveyed is located at 325 W. Eugenie Street in Project Lincoln Park I. Michael Stein's duties as a Department of Urban Renewal employee included the processing of Section 312 Loans, and he had personal knowledge of a Section 312 Application for Loan made by said Edith Uitti. On June 25, 1969 Michael Stein, et al, filed a Section 312 Application for Loan with the Department of Urban Renewal on the same property.

Section 91.107, Chap. 67½ of the Ill. Rev. Stats., contains the following pertinent provision:

> "No member or employee of a Department shall acquire any interest direct or indirect in any redevelopment project or conservation area or in any property included or planned to be included in any redevelopment project or conservation area, nor shall he have any interest direct or indirect in any contract or proposed contract in connection with any such redevelopment project or conservation area."

Similarly, Section 704, Part II of the Loan and Capital Grant contract with the Federal Government provides:

> "INTEREST OF LOCAL PUBLIC AGENCY PERSONNEL AND OTHER LOCAL PUBLIC OFFICIALS"
>
> (A) *Local Public Agency Personnel.* — The Local Public Agency will adopt and enforce measures appropriate to assure that no member of its governing body and no other officer or employee of the Local Public

Agency who *exercises any functions or responsibilities in connection with the carrying out of the Project* shall prior to the completion of the Project, voluntarily acquire any personal interest, direct or indirect, in any property included in the Urban Renewal Area, or in any contract or proposed contract in connection with the undertaking of the Project. If any such member, officer, or employee presently owns or controls, or *in the future involuntarily acquires* any such personal interest, he shall immediately disclose such interest to the Local Public Agency. Upon such disclosure, such member, officer, or employee shall not participate in any action by the Local Public Agency affecting the undertaking of the Project unless the Local Public Agency shall determine that, in the light of such personal interest, the participation of such member in any such action would not be contrary to the public interest. The Local Public Agency will promptly advise the Secretary of the facts and circumstances concerning any disclosure of interest made to it pursuant to this subsection."

We are of the opinion that, under the circumstances stated, Michael Stein was in violation of Sec. 91.101 of the Urban Renewal Consolidation Act of 1961, and his actions were contrary to the terms of the Loan and Capital Grant contract between the City and the Department of Housing and Urban Development. We believe it would be detrimental to the interests of the Department of Urban Renewal to approve said loan.

CONTRACTING UNDER MODEL CITIES PROGRAM

(Administrative Assistant to the Mayor, Model Cities Program—R. L. H. —January 14, 1970)

Returned herewith without approval is the above cited cooperation agreement.

Your attention is directed to the first paragraph of the said agreement wherein the Chicago Housing Authority is referred to as "a Public Agency of the City of Chicago". Please be advised that the Chicago Housing Authority is a separate and distinct municipal corporation of the State of Illinois, organized in 1937 pursuant to the enabling provisions of the Housing Authorities Act of 1934 (Chapter 67½, 1967 Illinois Revised Statutes) and is not a Public Agency of the City of Chicago.

It is the opinion of this Department that all contracts entered into by the City other than within the City government must be done in full compliance with the provisions of the Municipal Purchasing Act (Sections 8-10-1 through 8-10-24 of Chapter 24, 1967 Illinois Revised Statutes) which requires all City contracts to be awarded by the Purchasing Agent and executed by the Mayor, City Comptroller and the Purchasing Agent.

Since the Model Cities Grant Agreement provides for the carrying out of the Program to be in a lawful manner, full adherence to the aforementioned Act in Model Cities contracting procedures is required.

It will therefore be necessary to revise this contract, and utilize the contract form as was prepared for use with private contractors including the Personal Service Contract Part II and a signature page providing for signatures of the Purchasing Agent and Mayor in addition to those now appearing thereon.

MORTGAGE NOTE FOR DOUGLAS-LAWNDALE REHABILITATION PROJECT

(Commissioner, Department of Urban Renewal—S. R. D.—February 7, 1969)

We acknowledge receipt of your recent communication requesting our opinion as to whether the City of Chicago can sign a mortgage note in conjunction with the Douglas-Lawndale Rehabilitation Project.

Section 11-11-2 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, Chap. 24, par. 11-11-2) provides, in part, as follows:

> "The corporate authorities of each municipality may borrow money or other property * * * for or in aid of an 'Urban Renewal Project' as defined in the Act of Congress approved August 2, 1954, being Public Law 560-83rd Congress, known as the 'Housing Act of 1954', * * *. The corporate authorities may issue bonds, debentures, notes, special certificates or other evidences of indebtedness in order to secure loans made pursuant thereto. However, any such bonds, debentures, notes, special certificates or other evidence of indebtedness issued hereunder shall be payable solely out of the proceeds from the sale of real property acquired in the project area, out of any revenue from the operation, management or demolition of existing buildings or improvements of any real property acquired in such project area, out of such capital grants as the municipality may receive from the United States of America or any agency or instrumentality thereof, or out of any local cash or non-cash grants-in-aid, as defined in the Act of Congress approved July 15, 1949, being Public Law 171-81st Congress, known as the 'Housing Act of 1949', as amended, including the Housing Act of 1954, which the municipality or public body or any other entity may make in connection with the implementation of such Urban Renewal Project."

Section 27 of the Urban Renewal Consolidation Act of 1961 (Ill. Rev. Stat. 1967, Chap. 67½, par. 91.127) provides, in part, as follows:

> "Revenue bonds may be issued by a municipality and such bonds shall contain a provision that the principal thereof and interest thereon shall be payable exclusively from the proceeds and revenues of any redevelopment project or conservation area which is financed in whole or in part with the proceeds of such bonds, together with that amount of the funds of the municipality from whatever source derived as is necessary to constitute the local cash grant-in-aid for the redevelopment project or conservation area within the meaning of applicable federal law; provided, however that any such bonds may be additionally secured by a pledge of any loan, grant or contribution, or parts thereof, thereafter to be received from the United States of America or any agency or instrumentality thereof, or by the contracts therefor. The same bond issue shall not be payable from both a redevelopment project and a conservation area."

We are of the opinion that the City Council may pass an ordinance authorizing the city officials to sign a mortgage note in conjunction with the Douglas-Lawndale Rehabilitation Project provided that said note contains a provision that payment is limited to the various funds set forth in the above-quoted statutory provisions.

REFUND FROM CITY FOR MORTGAGE PREPAYMENT PENALTY

(Commissioner, Department of Urban Renewal—E. L. N.—June 9, 1970)

This is in response to your request for an opinion concerning the eligibility of former owners of property acquired by the City of Chicago for urban renewal purposes to obtain a refund from the City of Chicago for satisfying a mortgage prepayment penalty, under the Housing Act of 1965, as amended.

The relevant HUD regulations providing for such allowance state that reimbursement is available only when the mortgage prepayment penalty is enforceable

under local law and require that the Local Public Agency submit an opinion of counsel concerning such enforceability with each application. (Urban Renewal Handbook R.H.A. 7212.17 Relocation, Chap. 3, Sec. 1, App.5).

When the City acquires by deed under threat of condemnation the rights of a mortgagee to a prepayment penalty are not affected. Once it is established that a valid prepayment penalty has been paid by the former owner, pursuant to a proper demand by the mortgagee, the owner satisfies the eligibility requirements for reimbursement. An opinion of counsel to that effect, as required by HUD, could be prepared with certainty and without extensive examination.

When the City acquires through eminent domain proceedings to which the mortgagee is a party, the rights of the mortgagee under the mortgage contract are altered. The estate or lien of the mortgagee in the subject property terminates and the balance of the mortgage debt may be satisfied out of the condemnation award. *(Calumet River Ry.* v. *Brown,* 136 Ill. 322, 26 N.E. 501; *Chicago* v. *Sallinger,* 384 Ill. 515, 52 N.E. 2nd, 184).

Whether the estate, lien, or interest of the mortgagee against the mortgagor survive the condemnation so as to provide for enforcement of the mortgage prepayment penalty, is a question of some complexity. It depends for its resolution in each case upon the type, nature, and language of the mortgage contract. Section 14 of the Illinois Eminent Domain Act allows conflicting claims in the award to be determined in the eminent domain proceedings. (Chap. 47, Ill. Rev. Stats., Sec. 14).

The effect of the condemnation upon the enforceability of a mortgage prepayment penalty may best be examined in such a Section 14 hearing where an absolute determination can be made. Due to the difficulties involved in ascertaining the status of the mortgage prepayment penalty after condemnation, it is our opinion, that reimbursement should not be allowed without a Court order setting out the property owner's continued obligation.

In conclusion, where property is acquired by deed eligibility may be determined by an opinion of counsel. Where acquisition is by eminent domain proceedings, eligibility should be determined by Court order.

NEIGHBORHOOD DEVELOPMENT PROGRAM

(Commissioner, Department of Urban Renewal—R. F. S.—October 18, 1968)

As Corporation Counsel for the City of Chicago, I am an Attorney at Law, duly licensed to practice law in the State of Illinois. We have carefully reviewed the above referenced application, and it is my opinion that the City of Chicago has the power to execute the Program as set forth in the Application for Neighborhood Development Program as transmitted herewith.

The following is the statutory authority and the applicable State law giving to the City of Chicago the authority to proceed to carry out this Program. There has been no revision or amendment of any State or local law effecting the authority of the City of Chicago to proceed and to the best of my knowledge and belief, this opinion is true and correct.

It is contemplated in the Application that the City of Chicago will engage in the Neighborhood Development Program by virtue of the powers granted to it in Chapter 67½, Ill. Rev. Stats., 1967, Sections 91.101 through 91.136. In general, this will entail two interrelated approaches to accomplish the over-all objectives as set forth in the Application.

First, the City of Chicago contemplates that 21 projects, as delineated in the Application will be, or have been, designated "slum and blighted areas", and consequently the powers specifically set forth in paragraph 91.109 through

Section 91.119, grant the statutory authority to proceed. In seven projects the City of Chicago will designate, or has heretofore designated, them "conservation areas" and the power to implement the Program is set forth in Section 91.120 through Section 91.136. In view of the fact that the statutory authority, although overlapping in some respects, is different with respect to (1) a slum and blighted area and (2) a conservation area, this opinion will analyze the authority of the City of Chicago with these two approaches treated separately.

Slum and Blighted Areas Projects

The following projects, as set forth in the Application, have been duly designated by the City of Chicago "slum and blighted areas" in accordance with Chapter 67½, Ill. Rev. Stats., 1967, Sec. 91.103 (i) and Sec. 91.111:

1. *Clybourn-Ogden*

a. The Department of Urban Renewal on the 10th day of November, 1966, by Resolution No. 66-DUR-181 designated the said area a slum and blighted area.

b. The City Council of the City of Chicago, on the 29th day of December, 1966, approved the designation of the said area a slum and blighted area by ordinance as set forth in the Journal of Proceedings at pages 8307-8308.

2. *Chicago-Orleans*

a. The Department of Urban Renewal on the 21st day of May, 1968, by Resolution No. 68-DUR-61 designated the said area a slum and blighted area.

b. The City Council of the City of Chicago on the 26th day of June, 1968, approved the designation of the said area as a slum and blighted area by ordinance as appears in the Journal of Proceedings at pages 3272-74.

3. *North LaSalle*

a. The Department of Urban Renewal on the 19th day of December, 1967, by Resolution No. 67-DUR-167 designated the said area as a slum and blighted area.

b. The City Council of the City of Chicago, on the 30th day of January, 1968, approved the designation of the said area as a slum and blighted area by ordinance as appears in the Journal of Proceedings at pages 2281 to 2282.

4. *Roosevelt-Halsted*

a. The Department of Urban Renewal on the 11th day of August, 1966, by Resolution No. 66-DUR-120 designated the said area as a slum and blighted area.

b. The City Council of the City of Chicago on the 19th day of September, 1966, approved the designation of the said area as a slum and blighted area by ordinance as appears in the Journal of Proceedings at pages 7299-7300.

5. *60th and Cottage Grove*

a. The Department of Urban Renewal on the 8th day of October, 1964, by Resolution No. 64-DUR-128 designated the said area as a slum and blighted area.

b. The City Council of the City of Chicago on the 16th day of November, 1964, approved the designation of the said area as a slum and blighted area by ordinance as appears in the Journal of Proceedings at pages 3328-3329.

6. *63rd and Dorchester*

a. The Department of Urban Renewal on the 10th day of November, 1966, by Resolution No. 66-DUR-182 designated the said area as a slum and blighted area.

b. The City Council of the City of Chicago on the 29th day of December, 1966, approved the designation of the said area as a slum and blighted area by ordinance as appears in the Journal of Proceedings at pages 8308-8309.

7. *73rd and Dobson*

a. The Department of Urban Renewal on the 13th day of October, 1966, by Resolution No. 66-DUR-170 designated the said area as a slum and blighted area.

b. The City Council of the City of Chicago on the 15th day of November, 1966, approved the designation of the said area as a slum and blighted area by ordinance as appears in the Journal of Proceedings at pages 7499-7500.

8. *87th and Mackinaw*

a. The Department of Urban Renewal on the 16th day of December, 1966, by Resolution No. 66-DUR-194 designated the said area as a slum and blighted area.

b. The City Council of the City of Chicago on the 20th day of January, 1967, approved the designation of the said area as a slum and blighted area by ordinance as appears in the Journal of Proceedings at pages 8424-8425.

9. *69th—South Chicago*

a. The Department of Urban Renewal on the 16th day of December, 1966, by Resolution No. 66-DUR-193 designated the said area as a slum and blighted area.

b. The City Council of the City of Chicago on the 20th day of January, 1967, approved the designation of the said area as a slum and blighted area by ordinance as appears in the Journal of Proceedings at pages 8426-8427.

The following areas, in accordance with preliminary study made by the Department of Urban Renewal, comply with Chapter 67½, Ill. Rev. Stats., 1967, Sec. 91.103 (i), as a slum and blighted area. As yet, said areas have not been designated by Resolution or Ordinance as a slum and blighted area, and it is contemplated in the Application that these steps will be taken and a supplemental letter of opinion together with an appropriate ordinance and resolution will be submitted at a later date:

LAWRENCE-KEDZIE	24th-BELL
WILSON-RAVENSWOOD	45th-ASHLAND
CENTRAL WEST	35th-PARNELL
EAST GARFIELD	67th-STONY ISLAND
WEST GARFIELD	79th-RACINE
AUSTIN	33rd-MICHIGAN

In an area which has properly been designated a slum and blighted area in accordance with Chapter 67½, Ill. Rev. Stats., 1967, Sec. 91.111, the City of Chicago has the authority to (1) acquire real estate within the said area [Sec. 91.112] and (2) to contract for the removal of buildings [Sec. 91.113] and (3) improvement of streets, sidewalks, etc., [Sec. 91.114] and (4) convey certain property for park, play-ground and school purposes, (5) sell the real estate within the area for re-development [Sec. 91.118] and in general to accomplish the objectives as set forth in the said Application.

The Supreme Court of Illinois has repeatedly sustained the powers heretofore set forth with respect to an area which has been designated a "slum and blighted area". The first case in this regard is *Zurn* v. *City of Chicago,* 389 Ill. 114, 59 NE 2d. 18 (1945). The Court stated in the *Zurn* case:

"The achievement of the redevelopment of slum and blight area, as defined in the Act, in our opinion, constitutes a public use and a public purpose,

regardless of the use which may be made of the property after the redevelopment has been achieved".

In *Chicago Land Clearance Commission* v. *White,* 411 Ill. 310, 104 NE 2d. 236 (1952) and later in *City of Chicago* v. *R. Zwick Co.,* 27 Ill. 2d. 128 (1963), the Court again reaffirmed the fundamental doctrine as set forth in the *Zurn* and *White* cases. The Court stated in the *Zwick* case:

"That the public purpose of acquiring land in a slum clearance area is for the clearance of the slum, has been recognized many times by this Court and is conceded by Defendants. Land clearance satisfies public use, so that the type of re-development of a slum area has no relevance in a condemnation proceeding".

In conclusion, it is abundantly clear, that if an area is in fact a "slum and blighted area" within the definition as set forth in Chapter 67½, Ill. Rev. Stats., 1967, Section 91.103 (i), that the City of Chicago has the power and authority to exercise the powers specifically delineated in Section 91.109 of said Act. All of the programs contemplated by the Application, can properly be executed by the City of Chicago where areas are in fact designated "slum and blighted areas".

Conservation Areas Projects:

The following projects as set forth in the Application have been duly designated by the Department of Urban Renewal of the City of Chicago, or its predecessor, the Community Conservation Board, as conservation areas, in accordance with Chapter 67½, Ill. Rev. Stats., (1967), Section 91.103 (m). In addition, a Conservation Community Council was appointed and said Council approved a conservation plan for the respective areas. Said plan was also approved by the Department of Urban Renewal and the City Council of the City of Chicago.

1. *Lincoln Park*

a. The Community Conservation Board on the 12th day of July, 1956, designated said area a Conservation Area.

b. The Conservation Community Council, appointed in the area, approved a Conservation Plan on the 22nd day of May, 1962.

c. The Department of Urban Renewal approved the Conservation Plan for the area on the 29th day of May, 1962.

d. The City Council of the City of Chicago on the 15th day of June, 1962, approved the Conservation Plan by ordinance as set forth in the Journal of the Proceedings at pages 7294-95-96.

e. That the Conservation Community Council approved a plan known as the Lincoln Park I Urban Renewal Plan on the 21st day of June, 1965.

f. That the Department of Urban Renewal approved on the 22nd day of June, 1965, an Urban Renewal Plan known as the Lincoln Park I Plan.

g. The City Council of the City of Chicago on the 7th day of July, 1965, approved the Lincoln Park I Plan by ordinance as it appears in the Journal of Proceedings at pages 4934-4950.

h. That the Department of Urban Renewal approved an Amendment to the Lincoln Park Urban Renewal I Plan on the 8th day of August, 1968.

i. The City Council of the City of Chicago on the 30th day of January, 1968, approved the designation by the Department of Urban Renewal for the acquisition of certain properties in Lincoln Park II in accordance with the Urban Renewal Plan, by ordinance as set forth in the Journal of Proceedings at pages 2282-2284.

2. *Hyde Park-Kenwood*

a. The Community Conservation Board, on the 10th day of May, 1956, by Resolution designated the area a Conservation Area.

b. The Conservation Community Council approved a Conservation Plan for the said area on the 14th day of April, 1958.

c. The Community Conservation Board, on the 9th day of September, 1958, by Resolution approved a Conservation Plan for the said Area.

d. The City Council of the City of Chicago on the 7th day of November, 1958, approved the Conservation Plan for the said Area as set forth in the Journal of Proceedings at pages 8437-8524.

3. *Englewood*

a. The Community Conservation Board on the 13th day of September, 1956, designated the area a Conservation Area.

b. The Conservation Community Council duly appointed in said Area, on the 24th day of May, 1962, duly approved a Conservation Plan for the development of the said Area.

c. The Department of Urban Renewal approved a Conservation Plan in the said Area on the 29th day of May, 1962, by Resolution No. 62-DUR-26.

d. The City Council of the City of Chicago on the 15th day of June, 1962, approved the Conservation Plan for the Area by ordinance as appears in the Journal of Proceedings at pages 7291-7292.

4. *Near West Side Congress-Racine*

The said Area is a combination of Conservation and Slum and Blight, the Near West Side having been designated a Conservation Area as follows:

a. The Community Conservation Board designated said Area a Conservation Area on the 14th day of June, 1956.

b. The Conservation Community Council approved a Conservation Plan for said Area on the 24th day of July, 1961.

c. The Community Conservation Board approved a Conservation Plan for said Area on the 10th day of August, 1961.

d. The City Council of the City of Chicago on the 11th day of October, 1961, approved the Plan as appears in the Journal of Proceedings at pages 5607-5611.

e. In addition thereto, the Congress and Racine Area was duly designated a slum and blighted area and that all parcels, with the exception of a limited number as set forth in the Application, have heretofore been acquired and sold. The necessary prerequisite steps in the designation of this area have been accomplished.

5. *Uptown Conservation Area*

a. The Department of Urban Renewal has duly designated said Area a Conservation Area on the 13th day of October, 1966, by Resolution No. 66-DUR-169.

b. The Conservation Community Council, on the 15th day of July, 1968, approved a Conservation Plan for the said Area.

c. The Department of Urban Renewal of the City of Chicago on the 8th day of August, 1968, by Resolution No. 68-DUR-120, approved the Conservation Plan for the said Area.

d. The City Council of the City of Chicago, on the 9th day of October, 1968, approved the Conservation Plan for the said Area.

In the following areas the City of Chicago proposes to take all steps necessary in connection with the designation of the Area as a Conservation Area, the necessary approvals of a proper Conservation Plan being obtained in accordance with Section 91.121, as set forth in the Housing and Redevelopment Act of the State of Illinois. It is contemplated that these steps, when taken, will be documented to your office together with a letter of opinion indicating that the said Areas have been properly designated and that the Program as specifically delineated in the Conservation Plan can be effectuated.

With respect to the following project the appropriate action shall be taken to designate said areas Conservation Areas and approval of the necessary plan obtained:

Lake View, East Humboldt Park—Near Northwest

In an Area which has properly been designated a Conservation Area, in accordance with Chapter 67½, Ill. Rev. Stats., (1967), Section 91.121, and the development of a Conservation Plan and approvals by the necessary Corporate authorities, the City of Chicago then has the power to proceed with the acquisition and disposition of property in implementation of said Conservation Plan. (Chap. 67½, Ill. Rev. Stats., Sec. 91.122). These powers are substantially the same as those set forth with respect to a slum and blighted area. In addition, however, the City of Chicago has the additional authority to "improve, repair and rehabilitate structures within the area" (Sec. 91.122).

The validity of the Urban Community Conservation Act of 1953, which was subsequently incorporated into the Urban Renewal Consolidation Act of 1961, was tested by the Supreme Court of Illinois as to its constitutionality in *People, ex. rel., Gutknecht* v. *City of Chicago,* 3 Ill. 2d. 539, 121 NE 2d. 791 (1954). The Court in substance held that the elimination of a slum was in and of itself a public purpose and therefore the prevention of a slum by the acquisition of property in an area which tends to become a slum, is also a public purpose. The leading decision effecting conservation areas and, indeed, determinative of the right of a public body to proceed to clear areas which tend to become a slum, is *Green Street Association* v. *City of Chicago,* 373 F.2d. 1, cert. den., 387 U.S. 932, This appeal was taken in connection with the Englewood Conservation Area challenging the right of the City of Chicago to proceed in accordance with its Conservation Plan. The Court affirmed the position of the City of Chicago, recognizing a proper exercise of its power.

In addition, our office has reviewed the Neighborhood Development Program Grant Application, dated October 1, 1968, which was approved by the City Council of the City of Chicago on the 9th day of October, 1968, a copy of said ordinance is transmitted herewith including particularly the date and information relating to (a) the size and character of the Urban Renewal areas consituting the proposed program area, (b) the proposed program, (c) the activities to be undertaken by the City of Chicago in carrying out the proposed Program and (d) the proposed method of financing the Program, and I am of the opinion that the City of Chicago has the legal power to undertake, carry out and finance the Program and Program activities described in the Application.

I have also reviewed the legal information submitted herewith and have made an examination of applicable State laws and am of the opinion that since the date of the First day of October, 1968, when the legal information was prepared, there has not been any court decision, statutory or constitutional enactment, or any revision or amendment of any State or local law requiring any change or supplementation of the legal information submitted as aforesaid, and that the said information as of the date of this opinion, is, to the best of my knowledge and belief, true and correct.

The City of Chicago has been legally created and duly organized and has the legal power to undertake, carry out and finance the Program, in that the said City was incorporated by an Act to Incorporate the CITY OF CHICAGO, approved March 4, 1837, and that on April 23, 1872, the electors of the CITY OF CHICAGO, voted to adopt and become incorporated under an Act entitled

"An Act to Provide for the Incorporation of Cities and Villages", approved April 10, 1872, and in force and effect July 1, 1872, as subsequently amended. The specific powers of the City to contract and finance the Program as set forth in the Application for a Neighborhood Development Program are set forth in Chapter 67½, Ill. Rev. Stats., 1967, Section 91.124, and further, in Chapter 24, Ill. Rev. Stats., 1967, Section 11-11-2. These Sections generally grant to the City the authority to contract with the United States of America in connection with an Urban Renewal Project and also the authority to borrow money and, accept grants.

In conclusion, I am of the opinion, on the basis of the data and information submitted in support of the Application that:

(a) The proposed Urban Renewal Areas constituting the Program meet the requirements of State law, particularly Chapter 67½, Ill. Rev. Stats., 1967, Sections 91.101 through 91.136, for undertaking the proposed Program activities and carrying out the proposed Program therein.

(b) The Proposed Urban Renewal Areas, constituting the Program are within the meaning of Section 110 (c) of Title I of the Housing Act of 1949, as amended, to-wit:

(1) Clearance and redevelopment of slum areas that are dilapidated, obsolete, and deteriorated. (Slum and blighted areas).

(2) The elimination or prevention of the development or spread of slum and blight in areas which, because of dilapidation, deterioration and obsolescence tend to become a slum and blighted area. (Conservation areas).

(c) The Program and Program activities described in the Application are consistent with the various Urban Renewal plans which have been prepared for the Urban Renewal Areas, comprising the Areas covered by the proposed Program.

To the best of my knowledge there is no pending or threatened litigation of any kind concerning the said Program.

REDEVELOPMENT PLAN

(Commissioner, Department of Urban Renewal—T. A. F.—December 27, 1967)

As Counsel for the City of Chicago (hereinafter called "Local Public Agency"), and admitted to practice in the State of Illinois, my opinion, including factual statements requested by the Department of Housing and Urban Development, is as follows:

1. I have examined the Redevelopment Plan prepared by the Department of Urban Renewal of the City of Chicago relating to Project 73rd-Dobson, in the City of Chicago, County of Cook, State of Illinois (hereinafter called the "Plan"), which Plan is more specifically identified as follows:

A printed document dated June, 1967 entitled "Redevelopment Plan for Slum and Blighted Area Redevelopment Project 73rd-Dobson" consisting of five (5) pages and three (3) exhibits for the project area in the aforementioned project.

2. The Plan in form and substance is in accord with applicable law and as approved by the Department of Urban Renewal, on August 8, 1967 and by Ordinance of the City Council, adopted September 7, 1967, is a valid plan meeting all the requirements of State and local law and Title I of the Housing Act of 1949, as amended. The Plan is reasonably clear,

definite and unambiguous and does not provide for any illegal discriminatory action or illegal preferential action or requirement.

3. The territorial area covered by the Plan is within the territorial jurisdiction of the Local Public Agency and conforms to all legal requirements pertaining to the eligibility of such area for the above-identified project, and such area under State and local law is legally eligible and appropriate for the redevelopment activities contemplated under the Plan.

4. (a) The Plan includes all the provisions, drawings, maps, documents and other items required to be included pursuant to State or local law and the applicable requirements of Section 110(b) of said Housing Act.

(b) The Plan includes appropriate provisions describing the real property which the Local Public Agency is to acquire and that which it is not to acquire, and includes appropriate provisions for the imposition of controls and other requirements of the Plan upon all the real property in the Project area described in the Plan.

(c) The Plan is sufficiently complete to permit a determination to be made as to whether it conforms to the general plan of the community as a whole and to indicate its relationship to definite local objectives respecting appropriate land uses, improved traffic, improved public transportation, improved public utilities and improved recreational and community facilities in Chicago.

(d) The provisions in the Plan respecting land uses, building requirements and densities, land coverage and other features of the Plan are in accord with State and local laws and the requirements of Section 110(b) of said Housing Act.

(e) The provisions in the Plan for the vacation and dedication of streets and other public ways and for changes in zoning or building codes and regulations are in accord with State and local law and the controls in the Plan respecting the future use of the Project area described therein are reasonably clear and legally effective.

(f) The provisions in the Plan respecting the period of duration of the Plan and future changes in the Plan are legally adequate.

5. To my knowledge, there is no pending or threatened litigation concerning the Plan.

6. I have also examined a record of the official proceedings respecting the authorization and approval of the Plan by the Department of Urban Renewal and the City of Chicago.

7. The Plan has been duly approved by the Department of Urban Renewal and the City of Chicago. I have examined a record of the official proceedings respecting such approvals. All public bodies, officials and agencies which, under the State or local law, are required to authorize or approve the Plan, have done so.

8. A Public hearing on the Plan is not required under State or local law. Every public hearing otherwise required, including any such hearing on the Project (as distinguished from a public hearing, if any, on the Plan) under Sec. 105(d) of the Housing Act of 1949 as amended, or under any other Law, has been held in the time and manner, and at the place required following the giving of due notice to the appropriate parties by the appropriate public body or public official, all in accordance with Law.

9. All the procedural requirements, approvals and other actions and formalities required under State and local law to make the Plan legally effective have been duly fulfilled and completed as the case may be.

PRIVATE REDEVELOPMENT—CAPITAL AND FINANCING REQUIREMENT

(Commissioner, Department of Urban Renewal—E. L. N. November 14, 1969)

Pursuant to your request our office has reviewed the Contract for Sale of Land for Private Redevelopment, executed July 17, 1969, between the City of Chicago and United Dwellings Foundation of Metropolitan Chicago and Amalgamated Social Benefits Ass'n. We have also examined the Memorandum from your Consultant, Mr. Leonard A. Worsek, with respect to Parcel HR1-a. It is the opinion of Mr. Worsek that United Dwellings Foundation has not submitted evidence of adequate capital and mortgage financing to timely commence and consummate the said Redevelopment.

The aforesaid Contract contains the following SPECIAL PROVISIONS which relate to the subject matter of your inquiry namely, whether United Dwellings is presently in default:

> "(b) The Redeveloper shall, within ninety (90) days from the date of the Agreement, submit (i) evidence as to equity capital and necessary mortgage financing commitments with respect to the Construction Plans previously submitted and approved, or (ii) revised Construction Plans which are approved by the Agency and evidence as to equity capital and necessary mortgage financing commitments with respect to such revised Construction Plans; and
>
> (c) If the Redeveloper shall fail to comply with the requirements of (b), then, at the option of the Agency this Agreement shall be terminated as to Parcel HR-1(a), and the Redeveloper shall be released from any and all obligations with respect to all Parcels which are the subject matter of this Redevelopment Agreement; and the Agency shall be released of all obligations to the Redeveloper."

The other pertinent provision is Section I of the Contract which provides that the Redeveloper shall purchase the property on January 2, 1970.

Since the Redeveloper did not submit to the Department of Urban Renewal adequate evidence of equity capital and mortgage financing in accordance with Section 8(b) as hereinabove set forth, the Redeveloper is presently in default. The Department of Urban Renewal can terminate the Contract in accordance with Section 8(c) due to the breach by the Redeveloper of the provisions of Section 8(b) of said Contract.

The following procedure should be undertaken by the Department of Urban Renewal to declare said Contract in default:

1. The Department of Urban Renewal should pass a Resolution finding that the Redeveloper has not furnished evidence of equity capital and necessary mortgage financing to complete the project.

2. The Department of Urban Renewal should forward a Notice of Default to the Redeveloper by registered mail notifying him of his default and specifying the nature of his default.

3. Said Notice of Default should be recorded in the Recorder's Office in the Recorder of Deeds of Cook County, due to the fact that the original Contract has been duly recorded as Document No. 20928730.

If the Board of the Department of Urban Renewal finds that the Redeveloper has not complied with the provisions of Section 8(b) of said Contract and declares a default, our office will proceed to prepare the necessary legal documentation to effectuate a cancellation of the above referenced Contract.

CHAPTER V—REGULATIONS OF PUBLIC HEALTH, SAFETY AND WELFARE

Section A. FOOD AND DAIRY PRODUCTS

FOOD DISPENSER'S LICENSE REQUIRED FOR CHELSEA HOUSE

(Administrator, The Chelsea House—F. V. R.—June 6, 1969)

Your letter addressed to Mr. William Prendergast, City Collector, has been referred to the Law Department and the undersigned for response. You state that the Chelsea House is a retirement hotel with rent per resident being $140 to $175 per month depending upon the apartment's location, size, view and facilities. As part of the total cost, three meals a day are provided for the residents. The rent paid remains the same whether or not any of the meals are eaten. Guests who visit the residents, and employees of Chelsea House are not charged for meals they eat. You request an opinion as to whether a food dispenser's license pursuant to Chapter 130, section 130-16 of the Municipal Code of Chicago is needed by the Chelsea House and if a license is necessary what license fee is applicable.

Chapter 130, section 130-15 of the Municipal Code of Chicago states in part:

> "The term 'food dispenser' is hereby defined as any person that keeps for sale and sells for consumption on the premises . . . any article of food or drink for human consumption."

The answer with respect to whether a license is required in the present situation depends upon whether or not a sale of food, as contemplated by the above definition, has taken place.

A situation substantially similar to the instant case was discussed at 23 Opinions of the Corporation Counsel 322. That opinion dealt with whether a Y.W.C.A. cafeteria that served only the residents of the hotel, required a food dispenser's license. There, as here, no money was paid at the time of the meal, nor were any separate bills rendered for the food. The girls paid $12.50 to $14.50 per week, which sum included both room and board. In finding the cafeteria subject to the licensing provision of Section 130-16 that opinion concluded in part, that establishments of that type as a matter of public policy.

> "should be required to meet the requirements of the sanitary and public health regulations contained in the Food Dispensers Ordinance . . . ."

Although the question of whether or not there was a sale as contemplated by section 130-15 was not directly discussed in the above cited opinion, the question was impliedly answered in the affirmative. The mere fact a license was required by the Y.W.C.A. cafeteria discloses by implication that a sale of food had taken place. The above conclusion can be brought directly in line with the present situation: no money changes hands directly for the purchase of the food at Chelsea House, however, the price of the food is included in the monthly rent bill paid by the residents. The fact that money is not exchanged for the food at each meal makes it no less a sale than when it is paid for once a month. Further, the showing of a profit is not essential to constitute a sale. See, e.g., *South Shore Country Club* v. *People of the State of Illinois,* 228 Ill. 75 (1907).

In the light of the above principles the service of three meals per day to the residents of Chelsea House is a sale sufficient enough to bring the institution under the purview of the license provided for in Section 130-16.

You have also asked the amount the food dispenser's license fee will be in this situation. Since the dining operation is not for use by the general public the applicable fee is controlled by the provisions of Chapter 130, section 130-18, of the Municipal Code of Chicago, relating to licensed premises where the general public is not served, a copy of which is herewith enclosed.

COYNE ELECTRONIC INSTITUTE—CHARACTERIZED

(Superintendent of Police—D. P.—March 8, 1968)

Your recent letter, addressed to Raymond F. Simon, Corporation Counsel, requests an opinion as to whether the Coyne Electronic Institute is within the purview of the Municipal Code of Chicago, chapter 130, section 130-15.15 (d), which prohibits mobile food dispenser vehicles from parking within 20 feet of a "school" or a "place of business which deals in like or similar commodities such as are sold by the mobile unit."

Since the Vendall Service Corporation has installed vending machines in Coyne, an adult education institution, your specific question is whether Coyne is a "school" or "place of business."

This office is of the opinion that Coyne is not a school within the meaning of the ordinance. Nor do we believe that the presence of vending machines is sufficient to characterize Coyne as a place of business.

It should be noted that the reference to "school" is taken from a context which seems to indicate a concern for children: the ordinance speaks of a "school or school playground while school is in session." This language does not appear to contemplate protection for adults. Protection of children, however, has been approved by the courts. For example, in validating an ordinance which, in language similar to ours, limited peddling in the vicinity of schools, the Supreme Court of New Jersey declared that

> ". . . the protection of school children in their travels to and from a school is a proper subject for the reasonable use of the police power. The safety of children near schools during school hours, the added congestion in the streets when the schools open and close, the quiet and freedom from distraction that are necessary for fruitful study, are all valid objects which the police power can protect." [*Mister Softee* v. *Mayor and Council of Hoboken,* 186 A 2d 513, 522.]

Clearly, adults must cope with congestion and distraction constantly—areas of employment are probably subject to these conditions in a much greater degree than places of adult education. They may be expected to have developed their ability to handle these conditions. The activities of children away from home, however, are principally connected with school. It is for this reason that school areas are so obviously within the protection of the community. This distinction between adult and child protection is reflected, we believe, in the language of the ordinance.

In our opinion, the placing of vending machines in Coyne is not sufficient to characterize the building as a "place of business" within the intent of the ordinance. The use of vending machines is clearly incidental to the primary purpose of the institution's operations. Further, they generally are intended to be of use only to those within the building, not to the public; consequently, the number of people drawn to the area would not be great enough to cause traffic congestion.

For these reasons, then, we find that Coyne is neither a school nor a place of business within the scope of the Municipal Code of Chicago, chapter 130, section 15.15 (d).

APPLICABLE RESTRICTIONS: MOBILE FOOD DISPENSERS OF FROZEN DESERTS

(Alderman, Fifth Ward—A. H.—September 10, 1969)

We have your correspondence requesting an opinion with respect to whether ordinance and territorial restrictions against peddlers under Chapter 160 of the Municipal Code of Chicago apply to mobile food dispensers of frozen desserts, and which respect to the problem of loud noises emanating therefrom in the neighborhoods, near hospitals, home for the aged, nursing homes and similar situations.

On March 12, 1968, this office issued an opinion, hereby confirmed, a copy of which is herewith enclosed, stating that mobile food dispensers are subject to the limitations of Chapter 160, Section 160-13, with respect to the regulatory provisions thereof even though mobile food dispensers are not required to be licensed under that Chapter, but rather under Chapter 130, Sections 130-15.2, 130-15.5.

With regard to the noises emanating from the mobile food dispensers' vehicles, please be advised that the Appellate Court of Illinois, on May 29, 1963, upheld the City's authority to regulate "distinctly and loudly audible" noises of any kind upon the public way as prohibited by Chapter 99 of the Municipal Code of Chicago, Section 99-56, in *Mister Softee of Illinois* v. *City of Chicago,* 42 Ill. App.2d 414. In that case, mobile food dispensers vending frozen desserts attempted to enjoin the City from interfering with the amplification of jingles emanating from their trucks; however, the Appellate Court held (42 Ill. App.2d at 422):

> "The question of whether the volume of sound emanating from mechanical sound amplifiers or other similar devices to the level of distinct and loudly audible noises is best left to the discretion of the authorities charged with the duty of maintaining the peace and public safety."

Therefore, any complaint with respect to the emanation of loud noises in your community should be directed to your local police district for investigation and action, as suggested in *Mister Softee,* supra.

CREAM TOPPINGS FOR PIES AND PASTRIES

(Flint & Mac Kay—M. C. H.—October 1, 1968)

This is to acknowledge the receipt of your letter to our office in which inquiry is made as to whether or not the Chicago Board of Health has an ordinance regulating cream toppings for pies and pastries.

Please be advised that § 130-8.1 of the Municipal Code of Chicago, provides as follows:

> "In all food establishments, refrigerators shall be lined with impervious, non-absorbent material. There shall be separate compartments for keeping such food materials as may unfavorably affect any other food material kept in the same refrigerator. Scrupulous cleanliness shall be maintained at all times. All readily perishable food and drink shall be kept at or below 50°F. except during the actual preparation or serving of such food. This shall include all custard-filled, cream-filled pastries, milk and milk products, egg products, meat, fish, shellfish, gravy, poultry, stuffing sauces, dressings, and salads containing meat, poultry, fish, eggs, milk or milk products."

We also have Chapter 130-15.8, Municipal Code, governing mobile food dispensers, which provides as follows:

> "Adequate mechanical refrigeration equipment or its equivalent as approved by the board of health shall be provided and all meat, milk, dairy

products, fish, poultry and other perishable products, including meat sandwiches and cream-filled pies shall be stored in the vehicle at a temperature not in excess of 42°F. excepting that perishable food products commonly served as a hot food shall be stored in a heating appliance or oven that shall be equipped with a thermometer showing the internal temperature of such heating appliance, oven or device."

Enclosed find a directive of the Food and Drugs Division of the Illinois Department of Public Health, issued August 16, 1968 concerning bakery products and their potential hazards.

REGULATION OF MOBILE FOOD DISPENSERS

(City Collector—D. P.—March 12, 1968)

Your recent letter to Raymond P. Simon, Corporation Counsel, requests the opinion of this office as to the applicability of chapter 160, Municipal Code of Chicago, concerning the regulation of peddlers, to persons now licensed under chapter 130, section 130-15.1 *et seq.*, concerning the regulation of mobile food dispensers. Specifically, you wish to know whether mobile food dispensers are excluded from operating within the central business area of the city as are peddlers.

It is the opinion of this office that mobile food dispensers are subject to the limitations of chapter 160, section 160-13, of the Municipal Code of Chicago, which reads:

"No one having a peddler's license shall peddle any merchandise or any other article whatsoever, at any time, within districts which have been or shall be hereafter so designated by the city council."

Clearly, the definition of "peddler", in chapter 160, section 160-1, includes the activities of mobile food dispensers. Such dispensers are, of course, separately licensed under chapter 130, section 130-15.1 *et seq.*, of the Municipal Code of Chicago, because of the special sanitation requirements of their business. Under section 160-13 of Chapter 160, licensed mobile food dispensers are exempt from the need to purchase a peddler's license, but the regulatory provisions of that chapter, including any ordinances excluding peddling from designated areas of the city, remain applicable.

We conclude therefore that the licensed operator of a mobile food dispenser vehicle is subject to the same area restrictions as are other peddlers.

RIGHTS OF MOBILE FOOD DISPENSING VEHICLES

(Alderman, Fifth Ward—A. H.—August 6, 1971)

Your request for an opinion with respect to the rights of mobile food dispensing vehicles under Section 17-4.2 of the Municipal Code of Chicago, addressed to Corporation Counsel Richard L. Curry, has been referred to the undersigned for consideration and response. You ask whether Section 17-4.2 applies to mobile food dispensing vehicles, which you describe as plaguing residential communities by ". . . incessant ringing of bells, mechanical devices, and sound amplifying devices by peddlers of frozen desserts."

Section 17-4.2, now contained within the Noise Control Ordinance adopted by the City Council on March 10, 1971, is substantially similar to former Section 99-56 of the Municipal Code of Chicago, repealed by virtue of its having been incorporated in the Noise Control Ordinance aforesaid. Said predecessor Section 99-56 was construed by the Illinois Appellate Court, under circumstances very similar to the situation set forth in your letter, in *Mister Softee of Illinois* v. *City of Chicago,* 42 Ill. App.2d 414. There, plaintiffs were in the business of

dispensing soft ice cream by trucks on streets throughout the City of Chicago and, as a means of attracting the attention of prospective customers to their approach, said trucks were equipped with electrically operated sound devices which played chimes and jingles. Upon appropriate complaints having been made to the Police Department by complaining citizens of excessive noise produced by certain of said vehicles, certain truck operators believed to have been in violation of Section 99-56 were served with tickets and summonses. In reversing the finding and judgment of the trial court which temporarily enjoined the enforcement of said section, the Appellate Court considered a number of issues and held, *inter alia* (42 Ill. App.2d at 421-22):

> "The question of whether a person is making distinctly and loudly audible noise upon a public way so as to cause his prosecution for violating Section 99-56 is one of fact. The ultimate decision whether such a noise was created and the ordinance violated is for the trier of fact in a complaint brought under the ordinance. In the *Goodrich* case, the Supreme Court recognized that large numbers of persons advertising their wares for sale upon the public streets of the city would soon, if not immediately, become a public nuisance, which would urgently demand abatement. The opinion quotes the following language with approval from *New Orleans* v. *Fargot,* 116 La 369, 40 So 735, which involved similar issues: "We are not concerned with the right or authority of the city council to prohibit the peddling and hawking of wares, but we do think that that body has the right and authority to put a stop to loud and boisterous outcries of overzealous and anxious sellers of goods and wares on the public streets." In *Kovacs* v. *Cooper,* 336 US 77, it was urged that the ordinance of Trenton, New Jersey was so vague, obscure and indefinite as to be unenforceable. The argument centered around the words "loud and raucous noise." The United States Supreme Court in upholding the ordinance with respect to that charge, stated (336 US 79): "While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." There is a similarity between "distinctly and loudly audible . . . noise" the standard of Section 99-56 in the instant case, and "loud and raucous noises" the standard upheld in the *Kovacs* case. In the *Kovacs* case, the court said, (83): "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." The defendants do not seek to prohibit mechanical voice amplification, such as the playing of the Mister Softee jingle. The city seeks to regulate the use of such devices so that the volume of sound does not rise to "distinctly and loudly audible . . . noise." The question of whether the volume of sound emanating from mechanical sound amplifiers or other similar devices to the level of distinct and loudly audible noises is best left to the discretion of the authorities charged with the duty of maintaining the peace and public safety. Any dispute as to the application of the ordinance may be tested in court upon the trial of a complaint brought by the city for the alleged ordinance violation."

Having thus set precedent, the Appellate Court opinion gives clear guidance for the procedures to be followed in prosecuting violators of the Noise Control Ordinance of the City of Chicago. We suggest that complaints be lodged with the authorities and that investigations be made of the alleged violations to determine whether the factual circumstances fall within the ambit of Section 17-4.2 and should thereafter be prosecuted.

DISPENSING FOOD BY PRIVATE CLUBS

(Administrative Assistant to the Mayor—B. G.—July 9, 1969)

Your recent request to the Corporation Counsel regarding the necessity of a private club, which has a license to sell alcoholic beverages at retail, to acquire a food dispenser's license has been forwarded to the undersigned for reply.

Chapter 43, paragraph 95.24 of the Illinois Revised Statutes 1967 provides that a club in order to qualify as such must have cooking and dining facilities for the preparation and serving of food.

Chapter 130, Section 130-1 of the Municipal Code of the City of Chicago, provides, in part:

> "'The term 'retail food establishment' is hereby defined to mean any building, room, stand, enclosure, place, or establishment occupied and used as a place of business by food purveyors, food dispensers, and any other such place maintained or operated for the purpose of selling, offering for sale, or keeping with the intention of selling or distributing at retail any cooked or uncooked article of food, drink, confection, or condiment used for or intended to be used for human consumption; . . . ."

It is, therefore, our opinion that private clubs do require a food dispenser's license for the sale of food on their premises.

FOOD DISPENSER'S LICENSE—REVOCATION

(Administrative Assistant to the Mayor—M. S. J.—July 25, 1967)

Your request to the Corporation Counsel for an opinion as to whether the food dispenser license at the above cited location may be revoked, based upon information contained in the file attached to said request, has been referred to the undersigned for reply.

Section 11-42-5 of the Illiinois Municipal Code (Ill. Rev. Stat., Ch. 24, par. 11-42-5, 1965) is the enabling act which delegates to the corporate authorities of each municipality the power to "license, tax, regulate, or prohibit . . . all places for eating . . . ."

Pursuant thereto, Chapter 130, section 130-16 of the Municipal Code of Chicago provides that:

> "It shall be unlawful for any person to engage in the business of a food dispenser, without first having obtained a license so to do . . . ."

Chapter 101, section 101-27 of the Municipal Code of Chicago, here relevant as to the revocation of licenses, states in part:

> "The Mayor shall have power to revoke any license issued under the provisions of this code for good and sufficient cause.
>
> "If at any time after the granting of any license, any licensee shall have violated any of the provisions of this code or any statutes of the state in the conduct of his business, the Mayor may revoke the license therefor."

The file reveals that the licensee's premises at 812 N. Milwaukee Avenue were the storage place for a package of marijuana and that his lunchroom at 800 N. Milwaukee Avenue had no tobacco license. The manager of the licensee's premises was arrested and charged with being the keeper of a disorderly house: Municipal Code of Chicago, Chapter 193, Section 193.2. He was convicted and fined $500.00.

The above cited facts give rise to "good and sufficient cause" for the Mayor to revoke the license.

Section B. WEAPONS

REGISTRATION OF FIREARMS

(Editor of Action Line—M. E. A.—March 27, 1968)

Reference is made to your letter of March 12, 1968, in which you attach a letter of Hugh Burns relating to the registration of firearms.

Please be advised that a permit is required to purchase a hand gun in the City of Chicago. Any firearm purchased, whether within or without the City of Chicago, must be registered pursuant to recently enacted Chapter 11.1 of the Municipal Code of the City of Chicago. Presentation of your firearm to the City Collector is not required as part of the registration.

However, if a person is not eligible to register (for example, a narcotics addict, ex-felon, person under 18 years of age, etc.), he must within 10 days after his receipt of notice that the City Collector has refused to register the firearm, deliver that firearm to the Chicago Police Department.

REGISTRATION OF FIREARMS

(Special Assistant on Gun Registration—M. E. A.—May 7, 1968)

Reference is made to your letter of May 6, 1968 in which you request our opinion as to whether you may accept an application to register a firearm when the applicant refuses to give a social security number.

Chapter 11.1 of the Municipal Code of Chicago details specific information which shall be incorporated in the firearms' registration form. The registrant's social security number is not one of these specific items. However, the City Collector may include on the registration form "other relevant information deemed necessary by the City Collector". It is our opinion that the registration form must include the items on the form which are specifically enumerated in the Ordinance. As to the "other relevant information", such as the social security number, you may in your discretion accept an application without such "information".

WEAPON CONTROL AMENDMENTS

(Alderman Burke—M. E. A.—October 9, 1967)

Please be advised that on August 3, 1967, Senate Bill 1350 was enacted. This Bill becomes effective July 1, 1968. It provides in part that: "No person may acquire or possess any firearm or firearm ammunition within this State without having in his possession a Firearm Owner's Identification Card previously issued in his name by the Department of Public Safety under the provisions of this Act." The Bill details further requirements, exemptions and procedures for obtaining a Firearm Owner Identification Card.

You have previously advised us that there are pending before the City Council several revisions to Chapter 183 of the Municipal Code of Chicago relating to weapon control. These provide as follows:

(1) Including those persons who deal in the sale of weapons incidental to other commercial enterprises in the licensing of sellers of weapons provisions.

(2) Requiring, where the sale of a weapon is not made in person, that the written communication of the purchaser or a memorandum of the oral communication be attached to the reports of sales required of the seller.

(3) Including weapons larger than a size which can be concealed upon the person within the category of weapons for which a permit to purchase is required.

(4) Raising the permit to purchase fee from $2.00 to $5.00.

(5) Extending the prohibition against displaying weapons for sale to the advertising of weapons for sale.

Although legal arguments can be made both for and against the adoption of some of the above-described proposed amendments, it is our opinion that our office can legally defend the adoption of all of these amendments. However, in light of the problems inherent in the limited amount of weapons control which can be exercised at solely the municipal level and in light of the recent enactment of Senate Bill 1350, a copy of which is enclosed herewith, it is our opinion that the desirability of adopting these amendments as a matter of legislative policy is purely within the confines of the City Council.

GOVERNORS' PARADES AND FIREARMS

(Assistant to the Governor—M. E. A.—June 13, 1968)

Reference is made to your letter of June 11, 1968 in which you ask that we clarify the legislative intent of Section 11.2-1(8) of the Municipal Code of the City of Chicago.

It is not the legislative intent of Section 11.2-1(8) to place a burden upon the Governor of affording exemption of the prohibitions of Chapter 11.2 of the Municipal Code of Chicago by way of giving special permission to organizations to parade with non-concealed firearms. Section 11.2-1(8) merely means that if the Governor has *authorized a parade* of a military or civil organization, the prohibitions of Chapter 11.2 will not apply to members of these organizations marching in such parade.

"TURN-IN" AND IMPOUNDING OF WEAPONS

(Special Assistant to the Mayor on Gun Registration—M. E. A.—May 21, 1968)

Reference is made to your letter of May 20, 1968 in which you request our opinion as to several questions. The questions are set out below with our answers following:

Q (1) Will guns be impounded or will persons be required to turn in weapons if they have failed to register such guns?

A (1) If an arrest is made for failing to register a firearm and a search incident to that arrest discloses an unregistered firearm, the police officer making the arrest has the authority to confiscate the weapon pending disposal of the ordinance violation prosecution.

Q (2) Will the following cases require turn-in of guns?
UNREGISTERED WEAPONS AND ILLEGAL POSSESSION
REGISTERED WEAPONS AND ILLEGAL POSSESSION
UNREGISTERED WEAPON AND LEGAL POSSESSION

A (2) This appears to be primarily a law enforcement question. The only provision relating to "Turn-in" of guns is Section 11.1-11 which reads as follows:

"Any person who has registered or attempted to register pursuant to this Chapter shall deliver to the Chicago Police Department every firearm owned or possessed by him, within 10 days after his receipt of notice that the City Collector has refused to register or has revoked registration because of a disqualified application or applicant."

Any other type of unlawful possession should be treated in accordance with the method suggested in answer to your question No. 1.

Q (3) Your opinion dated May 7th on Social Security Number should be clarified.

Q (a)—Can we demand Social Security Number and Drivers License?

A (a)—Yes.

Q (b)—Can we demand either?

A (b)—Yes.

Q (c)—What is our position if the applicant refuses either?

A (c)—As indicated in our letter of May 7, 1968, the City Collector in his discretion may or may not refuse to register the firearm under these circumstances.

Q (d)—What is our position if we accept either or neither and the State of Illinois takes a different position?

A (d)—The enforcement of our ordinance should not be contingent on the manner in which the State of Illinois enforces its statute.

Q (e)—Should this be clarified with the Attorney General?

A(e)—No.

Q (4a) The copy of the attached application from TERRY BLANCHARD stated "I was in jail for 120 days for falsifying Selective Service Questionnaire. Is he excluded from registering?

A (4a) Yes. This violation is a felony. U.S.C.A. Tit. 50, App. § 311; Tit. 18, § 1. Therefore, Mr. Blanchard is not eligible to register his firearm within 5 years from release from jail. Section 11.1-15 of the Municipal Code of Chicago.

Q (4b) If he is, who notifies him to turn in his weapon to the Police Department? Sec. 11.1-11. Who is responsible to see that such weapons are turned in? Can the Collector order weapons to be turned in to the Police?

A (4b) The City Collector should notify Mr. Blanchard that he is ineligible to register and that he must turn his firearm into the Chicago Police Department within ten (10) days of receiving this notice.

Q (5) Can the Circle Acceptance Corporation be compelled to register these weapons while they are in their possession? Must they prepare the Dealer transfer application upon the sale of the weapon to the highest bidder if the bidder is a Chicago resident?

A (5) Yes. Yes.

Q (6) Under date of April 24th Sam Santo Sport Store sent a letter to the Corporation Counsel regarding weapons used for testing. May we have a copy of your reply?

A (6) We have not replied to the letter of Sam Santo Sport Store.

MAIL ORDER SALES

(Special Assistant to the Mayor on Gun Registration—M. E. A.—April 15, 1968)

Reference is made to your letter of April 11, 1968 in which you refer to us the letter of Kenneth C. Cole, Manager, Civic Affairs, Illinois Retail Merchants Association.

In his letter, Mr. Cole attaches six (6) sets of questions relating to newly enacted Chapter 11.1 of the Municipal Code of Chicago. The questions and replies are set forth as follows:

I.

Q. How can the physical description of the purchaser be obtained in a mail order sale of firearms?

A. This physical description can be obtained from questions posed on the mail order form filled out by the purchaser.

Q. How can the purpose for which firearms are purchased be determined?

A. The purpose for which the firearms are to be purchased can be obtained by posing the question to the purchaser on the mail order form.

Q. Must the store investigate to be sure that the information provided by the buyer is true and correct?

A. Section 11.1-5 of the Ordinance requires: "At such time of sale the seller shall witness to the best of his knowledge that the information submitted on the registration form by the purchaser is true and correct and that the transaction is not in violation of law."

II.

Q. Will the seller be required to take the gun back into his inventory if the city refuses to register it to the buyer?

A. The Ordinance does not require the seller to do this. However, requirements of civil liability and public policy may dictate that this be done.

Q. What if the firearm has already been fired by the buyer?

A. Again, this is solely a matter of civil liability and store policy.

III.

Q. How can the registration form be executed by both seller and purchaser in mail order sales?

A. The registration form must be executed by both the seller and the purchaser. The mechanics of doing so in a mail order sale must be worked out by the seller in a feasible manner.

IV.

Q. Can store security people travel from home to store with a firearm owned by the company?

A. The firearm should be kept at the store, unless it is broken down in a non-functioning state or is not immediately accessible. Thus, the firearm could be transported in a trunk of an automobile. See Section 11.2-1 (10) of newly enacted Chapter 11.2 of the Municipal Code of Chicago.

Q. Can they travel from one store to another with a company owned firearm?

A. See answer set forth above.

Q. In whose name must this firearm be registered?

A. If the firearm is owned by the store it must be registered in the name of the store. If owned by the individual, the individual must register it.

V.

Q. In Section 11.1-14, the Ordinance says in part "any part or parts of such weapon", does this include telescopic sights, gun slings, swivels or stocks, and is the merchant to maintain a register and running inventory of all such parts as he does for firearms themselves?

A. An inventory and register of all parts of firearms, including those enumerated in your question, must be maintained by the seller.

VI.

Q. If a duplicate copy of the registration form will satisfy a retailer's record-keeping requirements, why is it required at all, since the original will be on file in the City Collector's office. Wouldn't the retailer's copy then serve no useful purpose?

A. The duplicate record keeping by the retailer and the City Collector would serve as a means of verifying the accuracy and completeness of the records of both the retailer and the City Collector. If it is found that this duplicate record keeping is unnecessary, the Ordinance could be amended at a later date.

DISPOSITION OF STOLEN GUNS

(Special Assistant to the Mayor for Gun Control Registration—R. F. F. —December 4,1969)

This is in response to your letter of December 2, 1969, in which you inquired whether stolen registered guns recovered by the police may be returned to their rightful owners. The Municipal Code of the City of Chicago provides that property recovered by the Police is to be kept by the custodian of lost and stolen property of the Police Department, and sets forth the procedure by which the owner may recover his property. Under Sec. 11-17 of the Code the rightful owner must claim the recovered weapon within 30 days of the final disposition of any court proceedings in connection with the weapon or, if no court proceedings are held, within 30 days of the weapon's seizure. If the weapon is not claimed within the stated time, the weapon is required to be destroyed under the provisions of Sec. 11-20.

STORAGE OF SMALL ARMS AMMUNITION

(Director in Charge, Bureau of Fire Prevention—G. M. K.—June 7, 1973)

In your letter of May 24, 1973 you sought interpretation of the Municipal Code with respect to the provisions applicable to the storage of small arms ammunition and in particular you raised the following questions:

1. Is small arms ammunition required to be stored in a magazine?
2. May a magazine be stored in a basement?
3. May small arms ammunition be stored on the ground floor in other than a magazine?
4. If a magazine is required, at what quantities would it be required?

In Section 60-2 of the Code, "explosives" is defined so as to include small arms ammunition, but the definition is conditioned upon the destructive effect of the particular substance. Section 125-1 of the Code, requires a license for certain operations concerning "explosives" and this section separates fixed ammunition from other types of explosives. Thus it would appear that a proper reading of the code would make a distinction between small arms ammunition and other types of explosives. Support for this type of interpretation can be found in Chapter 93, Sec. 144, Ill. Rev. Stat. 1971, which makes a similar distinction between explosives and small arms ammunition.

In Sections 125-3 and 135-6, the code indicates how to distinguish small arms ammunition from explosives as such. In setting up two different license fees for operations with "explosives", Section 125-3 draws a distinction at 25,000 cartridges. Section 135-6 permits one operating under a hardware store license to

handle up to 25,000 cartridges. Thus, it would appear that a quantity of less than 25,000 cartridges would not be considered as explosives but that a quantity greater than 25,000 cartridges would place that bulk within the definition of explosives. So as not to defeat the purpose of drawing a distinction at 25,000 cartridges, this must be an aggregate of the cartridges on a single premises and not just the quantity in any particular place or position on the premises.

Bearing in mind this distinction between explosives and quantities of small arms ammunition less than 25,000 cartridges, it would appear that the requirement of a magazine for the storage of explosives, Section 125-16 would not apply to small arms ammunition when less than 25,000 cartridges are merely stored. However, Section 125-16 would apply and a magazine is required when more than 25,000 cartridges are to be stored or when there are activities involving explosives or fixed ammunition beyond mere storage and sale.

Section 125-21 requires a metal mesh to surround fixed ammunition when it is stored above the ground floor in a building used for any other purpose. Since a magazine is required for quantities of cartridges in excess of 25,000, Section 125-21 would apply only to quantities of less than 25,000 cartridges and then only when stored above the ground floor. For Section 125-21 to have any real meaning, "above the ground floor" must be read to mean that the storage area involved occupies space above the level of the floor of the ground floor, and should not be read so as to apply only to storage on floor levels above the ground floor. Section 125-21 thus should apply to ammunition stored above the level of the ground floor and would ordinarily apply to storage on the first floor of a building.

Section 60-2 defines "magazine" and Sections 60-17 and 60-37 deal with the building requirements of a magazine. According to Section 60-37, a first class magazine may have neither a basement nor a mezzanine. While Section 60-37 does not make such specific prohibitions as to second class magazines, Section 60-17 requires a safety-clearance for all magazines and part of the safety clearance is that the area above the magazine be open to the sky. Thus, a magazine may not be placed in a basement or in any position where the safety clearance requirements of Section 60-17 are not met.

The questions raised above may be answered as follows:

1. Small arms ammunition need not always be stored in a magazine unless there are activities involving ammunition or explosives other than storage and sale.

2. A magazine may not be placed in a basement and further a magazine must meet the requirements of Sections 60-17 and 60-37.

3. Small arms ammunition may be stored on the ground floor in other than a magazine if there are less than 25,000 cartridges and if there are no activities involving ammunition or explosives beyond storage and sale, and if the metal mesh required by Section 125-21 is provided.

4. A magazine is required for small arms ammunition when more than 25,000 cartridges are to be stored or at any time when there are activities involving ammunition or explosives other than storage and sale.

TRANSPORTING WEAPONS

(R. J. P.—M. E. A.—May 7, 1968)

Reference is made to your letter of April 16, 1968 to the Chicago Police Department.

Please be advised that Chapter 11.2 of the Municipal Code of the City of Chicago provides that weapons may be transported in vehicles "in a non-functioning state or not immediately accessible". A copy of this Chapter is enclosed herewith.

GUN REGISTRATION—ENFORCEMENT

(Acting Director, Research and Development Division, Chicago Police Department—R. F. F.—March 23, 1971)

This is in answer to your letter of January 21, 1971 inquiring about enforcement of Section 11.1-11 of the Municipal Code.

1. "Is the 'name check' information which was used to determine that the individual was ineligible to receive a firearm sufficient to presume a violation of the Municipal Code?"

If reliable information is received that a registrant is ineligible upon one of the grounds stated in Section 11.1-15, such registration may be revoked.

2. "Would such information be sufficient to support an arrest without a warrant based on reasonable grounds."

Section 107-2(c) of the Code of Criminal Procedure states that an officer may arrest without a warrant when "he has reasonable grounds to believe that the person . . . has committed an offense." Reasonable grounds for such a belief must be based on reliable information, such as a report from a State officer or a proven informer, *People* v. *McCray*, 33 Ill. 2d 66 (1965) *aff'd.* 386 U.S. 300, but may not be based on suspicion or rumor. Thus, for example, an officer who knows the suspect has registered a weapon and was convicted of a felony within five years may make such arrest.

3. "Would such information be sufficient to form the probable cause necessary for the issuance of a search warrant?"

An application for a search warrant must be supported by probable cause, and the place to be searched and the item to be seized must be described with particularity. Moreover, an officer applying for a search warrant must state the circumstances underlying his belief that the item desired is in the particular place indicated. *Aguilar* v. *Texas*, 378 U.S. 108 (1964). Thus, in order to obtain a warrant to search the residence of a suspect, there must be some reason to believe an illegally registered weapon is on the premises.

4. "Would such information be sufficient basis for the issuance of an arrest warrant?"

Section 107-9 of the Code of Criminal Procedure sets forth requirements for obtaining an arrest warrant. If those requirements are complied with, supported by reliable information, as stated above, an arrest warrant should issue.

5. "Would the registration information fall within the purview of *Haynes* v. *United States*, 390 U.S. 85 (1968)?"

The statutes considered in *Haynes* required the registration of quasi-legal weapons such as short-barreled rifles and silencers. The Court voided Haynes' conviction, for under the terms of the statute, the act of registration amounted to an admission that the owner failed to comply with other statutes regulating such weapons. Under the Illinois statutes and the Chicago ordinances, there is nothing illegal about the ownership of most types of firearms. Thus, the terms of the Chicago Registration Ordinance do not require the registrant's admission of an illegal act. (The Illinois Supreme Court, in *Brown* v. *City of Chicago*, 42 Ill. 2d 501, 505 (1969), held void Section 11.1-14's requirement that silencers be registered. Since possession of silencers is illegal, registration amounted to self-incrimination.)

GUN REGISTRATION—ENFORCEMENT

(Special Assistant to the Mayor on Gun Registration—M. E. A.—May 21, 1968)

Reference is made to your letter of May 20, 1968 in which you ask whether the Chicago Police Department and other law enforcement agencies may lawfully delay enforcement of the Gun Registration Ordinance until you have processed administratively the backlog of applications.

Your question is primarily one of police policy. If you and the various law enforcement agencies agree that it would be administratively impossible to enforce the Gun Registration Ordinance until the backlog of gun applications are processed, you may do so for a reasonable length of time. Another alternative might be to allow the Police Department to arrest violators after verifying from your office that a registration application has not been filed.

Perhaps, both of the above mentioned alternatives might be used simultaneously. That is, a general crack-down of violators could be delayed until all the applications are processed. However, if individual violators are found during usual police work, these individuals could be charged after verification from your office that no registration application has been made.

FIREARM REGISTRATION VIOLATIONS—EVIDENCE NECESSARY TO CONVICT

(Superintendent of Police—R. F. F.—March 3, 1970)

This is in answer to your letter of 17 February 1970, requesting opinions.

1. What types of evidence are needed to sustain a conviction for violating section 11.1-7 and 11.1-8 of the Municipal Code of Chicago?

To secure a conviction under section 11.1-7, failure to registered a firearm, it must be shown that the suspect was in possession of a firearm and such firearm was not registered. That the weapon was not registered may be proved in one of two ways. First, a certified copy of the gun registration record may be brought to court. (Naturally, it should be dated at a time subsequent to the suspect's arrest.) Second, a letter, certified by the City Clerk may be used. The letter should state that the City Clerk finds no registration for the weapon and suspect in question.

To secure a conviction under section 11.1-8, failure to carry the city registration card, it must be shown that the weapon was registered (using one of the methods described above) and that the suspect did not produce the registration card when requested by the police officer.

2. What type of evidence must be produced in order to secure a conviction for violating section 83-2 of the Illinois Criminal Code?

Section 83-2 requires that the State Firearm Owner's Indentification Card must be in the possession of one owning or possessing firearms or firearm ammunition. Thus, it is only necessary to show in court that the suspect possessed such a firearm but was not at the same time also carrying the Firearm Owner's Indentification Card.

3. When may a firearm be seized as contraband?

It is the obligation of the Department of Police to seize and retain as evidence all firearms taken from persons suspected of violating one or more of the following laws: unlawful use of weapons, failure to possess a State Firearm

Owner's Identification Card, failure to register a weapon under City Ordinance; or as evidence of or in connection with any other illegal activity.

Section 24-6(a) of the Illinois Criminal Code requires that *upon conviction* of violating section 24-1 or section 24-3.1 of the Criminal Code (unlawful use and unlawful possession of weapons) any weapon so seized shall be confiscated by the trial court. Section 24-6(b) provides that *stolen* weapons so confiscated shall be returned to the person entitled to possession, if known. If unknown, at the discretion of the trial court, the weapon may be destroyed or it may be preserved as the property of the police department that seized the weapon.

If there is no conviction upon the charge for which a weapon was seized, the weapon should be returned to its proper owner, but only upon the satisfaction of two-conditions.

First, the person seeking to obtain a weapon must be one entitled to its possession. That is, he must be able to show that he is not disqualified to possess a weapon under state law (Ch. 38, Sec. 24-3.1) and was in possession of the State Firearm Owner's Indentification Card. Moreover, he must also show that he registered the weapon in accordance with the Municipal Code of Chicago and possesses such a registration certificate.

Second, possession of such a weapon must be obtained by following the proper procedure. At all times when such a seized weapon is not being used in court for evidence, it must be held by the police custodian of lost and stolen property, a requirement which is stated in Section 11-16 of the Municipal Code of Chicago. After final disposition of the court proceedings, a person wishing to obtain such a weapon must follow the provisions of Section 11-17 of the Municipal Code:

> "If such property shall not be claimed by the rightful owner thereof and possession surrendered to such owner within 30 days from the date of final disposition of the court proceeding in connection with which such property was seized or otherwise taken possession of, or, in case there are no court proceedings, then if such property shall not be claimed by the rightful owner thereof and possession surrendered to such owner within 30 days from the date of such seizure or taking by the police, said custodian shall proceed to dispose of said property."

In other words, weapons should be surrendered to such owner only if a request to the Department of Police (not the court) is made within the stated 30 day period.

4. In answer to your question concerning evidence necessary to convict for carrying concealed weapons, please have reference to our memorandum to you on this subject dated May 16, 1968, a copy of which is enclosed.

PROSECUTION FOR CARRYING UNREGISTERED FIREARMS

(Superintendent of Police—R. F. F.—February 3, 1970)

This is in answer to your letter of January 30, 1970, inquiring about violations which may be charged against persons carrying unregistered firearms.

In regard to the Chicago firearm registration ordinance (Municipal Code, Ch. 11.1), a person apprehended carrying a firearm without simultaneously carrying a Chicago registration certificate for it should be charged *both* with violating sections 11.1-7 and 11.1-8 of the Municipal Code. If the suspect had failed to register the weapon, he may be convicted under section 11.1-7, which requires registration of firearms. But, if investigation reveals the suspect was carrying a weapon registered to him, he cannot be convicted under section 11.1-7. Under those circumstances, if he is also charged with violation of section 11.1-8, a conviction may be obtained under that section for failure to carry the registration certificate.

Before trial, it must be determined whether the suspect in fact had not registered the weapon. If he did not, he can be convicted only of failure to register (section 11.1-7) but he can no longer be convicted for failure to carry the certificate (section 11.1-8). Prosecution under section 11.1-8 arguably requires the defendant to incriminate himself under section 11.1-7 by showing he never registered the weapon.

As to violations of State law, it should be noted that under the Criminal Code, chapter 38, section 83-2, a person possessing a firearm must also possess the State Firearms Owner's Identification Card. If he does not, he should be charged with violating section 83-2. Since the Chicago Ordinance requires registration of the *weapon* and the Illinois Criminal Code requires registration of the *owner*, they charge two separate offenses. It will not be considered harrassment for an officer to charge a suspect with violating all the laws mentioned if the facts warrant.

As you know, the ordinance violation is prosecuted by the Corporation Counsel and the State charge by the States Attorney. Whether as a practical matter it is advisable to bring *both* prosecutive officers into a particular case is a policy decision to be made depending upon the circumstances of the case. This can be made initially at the time the charges are to be placed, or if need be, can be delayed until the time of trial.

REVOCATION OF GUN REGISTRATION

(Special Assistant for Gun Registration—R. F. F.—May 5, 1970)

This is in response to your letter of April 20, 1970, asking opinions on the following questions concerning revocation of gun registration for conviction of a felony.

1. Whether a person convicted in Wisconsin for child abandonment may register a weapon pursuant to Chapter 11.1.

Child abandonment is a felony in Illinois (Ill. Rev. Stat. (1969) Ch. 23, sec. 2359) as well as Wisconsin. A conviction for such an offense is reason to refuse or revoke gun registration under Chapter 11.1 of the Municipal Code.

You further state that a police inquiry reveals that the person referred to above was "discharged from sentence" by the Wisconsin trial judge. We assume that phrase means that the person was convicted, but sentence was suspended. If such be the case, the registration may be refused, for Section 11.1-15 prohibits registration for *conviction* of a felony.

2. Whether registration may be revoked for a registrant who was convicted of robbery and sentenced to the penitentiary, one year on each count of 8 counts.

It is our opinion that the last sentence of Section 11.1-15 authorizes a revocation for conviction of a felony. Since the registrant was convicted, regardless of the sentence imposed, registration may be revoked.

FIREARMS SALESMEN

(Special Assistant to the Mayor on Gun Registration—M. E. A.—May 21, 1968)

Reference is made to your letter of May 20, 1968 in which you ask our opinion as to two letters received by you.

As to the letter received from Mr. Mark K. Benenson, it is our opinion that the procedures set forth therein comply with our Gun Registration Ordinance.

In the letter received from the National Shooting Sports Foundation, Inc., the author poses the following questions which are set forth below with our answers.

Q. (1) Does a sales representative who calls on major wholesale distributors or retail firearms dealers in Chicago have to register his sample firearms with your department?

A. (1) No.

Q. (2) If the sales representative is a resident of Chicago carrying on the above-mentioned duties, does he need to register his firearms?

A. (2) No.

Q. (3) If the sales representative lives outside the City of Chicago and Chicago is in his sales area, will he need to register his firearms while going in and out of Chicago making sales calls?

A. (3) No.

GUNSMITHS AND DEALERS

(Superintendent of Police—R. F. F.—August 20, 1970)

This is in answer to your letter of August 6, 1970, in which you request opinions concerning dealers in weapons and gunsmiths.

1. Are hardware dealers authorized to sell firearms?

Hardware dealers, meaning those licensed under Section 135-1 et. seq. are not permitted, under the Municipal Code, to sell any firearms of any sort unless they also have obtained license to do so under Section 183-1 et. seq. Section 135-6 merely defines dealers in firearms as being among those requiring hardware store licenses.

2. Does obtaining of a license to sell firearms under Section 183-1 also allow a person to repair firearms?

According to the terms of Sections 183-9.1 and 183-9.3, a person who is a dealer in firearms must also obtain a license to repair such weapons. However, Section 183-9.3 waives the gunsmith license fee for persons who are also licensed sellers of firearms.

3. Who must submit a report of firearms repaired, required by Section 183-9.4?

According to the terms of Section 183-9.4 *every* person licensed as a gunsmith is required to report to the Superintendent of Police all firearms received for repair. Moreover, under this section *all types* of firearms received for repair must be reported. "Firearms," for the purpose of this section, are not limited to pistols and revolvers.

4. May a person making a report pursuant to Section 183-9.4 be required to include in such report the number of the City of Chicago registration certificate in addition to the other information required by that section?

Under the terms of Section 183-9.4, which was enacted prior to the City of Chicago Firearm Registration Ordinance, the firearm registration number need not be reported. The Superintendent of Police, however, may request all gunsmiths to make such a report on a voluntary basis along with the other required information.

5. May a gunsmith or dealer be required to refuse to repair an unregistered firearm?

Nothing in the City Code requires a gunsmith to refuse to repair an unregistered firearm. However, a gunsmith would certainly be justified in refusing to repair such an illicit firearm. Moreover, the Superintendent of Police could also request all gunsmiths to cooperate by refusing to make such repairs.

6. Does the City of Chicago gunsmith licensing ordinance require licensing of facilities that make improvements upon firearms, such as mounting telescopic sights?

For the purpose of these licensing provisions, "repair" should not be construed in its narrowest sense. Since the ordinance is entitled "Gunsmiths" and since firearm repair shops are equipped not only to make repairs but also to add improvements, the term "repair" should be construed to include all types of operations upon all types of firearms.

LINCOLN PARK GUN CLUB

(City Collector—M. E. A.—March 14, 1968)

Reference is made to your letter of February 27, 1968, in which you forward for our consideration the February 12, 1968 letter from Lincoln Park Traps, Inc. addressed to you.

In this letter Lincoln Park Traps, Inc. poses the following questions:

(1) "Under the law covering Gun Registration, would it be possible for the manager of Lincoln Park Gun Club to be authorized by your office to register guns? We have 250 members and approximately 1000 occasional shooters who use the facilities of Lincoln Park Gun Club for clay target shooting. This procedure would expedite the registration of guns, and the Officers and Directors of Lincoln Park Traps would then be assured that every shooter using the Club would be registered."

(2) "Lincoln Park Traps is one of the largest target shooting Clubs in the United States. We were the 10th largest in attendance this past year. As such, we have shooters from all over the Country. We have many members living outside Cook County who shoot targets continuously at this Club. A large percentage of these shooters have lockers in the Club where they keep their shotguns. Others bring them to the Club. What is the law with reference to those persons who keep their guns in Chicago and those that take theirs home when they are through shooting. Both type shooters live outside of Cook County."

(3) Whether young persons 18 years of age or under may possess and use firearms at the target ranges at Lincoln Park?

(4) Whether young persons under 18 years of age may transport shotguns in their automobiles within the City of Chicago?

We reply to these four (4) questions in the same order as presented as follows:

(1) The manager of Lincoln Park Gun Club is not authorized to register guns. This function belongs solely to the City Collector of the City of Chicago. However, the manager could distribute applications for registration and assist gun owners in preparing the registration application form. Toward this end, the City Collector could forward a batch of registration application forms to the manager of the Lincoln Park Gun Club.

(2) Those persons who keep their guns in the City of Chicago are required to register the guns pursuant to Chapter 11.1 of the Municipal Code of the City of Chicago. Those persons who live outside of Cook County and transport their guns to the Lincoln Park Gun Club are not required to register their guns. Pursuant to Section 11.2-1 (7), these persons may transport their weapons through the City of Chicago to the Gun Club.

(3) Persons under 18 years of age are ineligible to register firearms and for that reason may not personally possess firearms. However, if the use of the firearms at Lincoln Park Gun Club is supervised by a responsible adult who has registered the weapon, then the weapon will be deemed to be possessed constructively by the adult. Under these circumstances, the young person could use the weapon at the Lincoln Park Gun Club.

(4) Young persons under 18 years of age may not transport shotguns in their automobiles within the City of Chicago. However, a responsible adult could transport firearms to be used at established target ranges, such as the Lincoln Park Gun Club.

GUN REGISTRATION—MINORS

(Special Assistant to the Mayor on Gun Registration—M. E. A.—March 14, 1968)

Reference is made to your letter of February 28, 1968 in which you forward for our consideration the January 25, 1968 letter of Alderman Thomas F. Fitzpatrick. In his letter, Alderman Fitzpatrick is concerned with whether a young person under 18 years of age may (a) register a firearm, (b) fire a firearm, and (c) transport a firearm.

Chapter 11.1 of the Municipal Code of the City of Chicago does not permit the register of firearms by persons under 18 years of age.

Chapter 11.1 does not, however, prohibit the firing of a firearm by a minor if the weapon is in constructive possession of a proper registrant. A minor may not possess a firearm since he is ineligible to register it. However, if a qualified adult has registered the firearm, or if the firearm is exempt from registration (for example, a weapon owned by the United States Government), a person under 18 years of age could fire the weapon providing that he is supervised by the registrant or if the weapon is exempt from registration by a responsible adult.

Chapter 11.1 and Chapter 11.2 do not wholly prohibit the transportation of firearms. Section 11.2-1 (7) specifically exempts from the prohibition against transporting firearms, "Members of any club or organization organized for the purpose of practicing shooting at targets upon established target ranges, whether public or private, while such members are using their firearms on such target ranges." Therefore, firearms may be transported by responsible adults for target practice and shooting meets.

OWNERSHIP AND USE BY NON-CITIZENS

(L. P. D.—M. E. A.—March 4, 1968)

Reference is made to your letter of February 27, 1968 in which you ask whether there are any special laws pertaining to the ownership and use of firearms by non-citizens.

The recently enacted City of Chicago ordinances relating to firearms are applicable to citizens and non-citizens alike. A copy of these ordinances are enclosed for your convenience.

In regard to Illinois Statutes concerning firearms and non-citizens, we would suggest that you contact the Attorney General of Illinois.

PAWNBROKERS—RESPONSIBILITY FOR REGISTRATION

(City Collector—M. E. A.—February 15, 1968)

Reference is made to your letter of February 12, 1968 in which you ask our opinion as to whether it will be necessary for a pawnbroker to complete a registration form upon a redemption by a pledgor of a firearm.

Assuming that the firearm is in the possession of a pawnbroker solely as security for a loan, there is not a sale either at the time of the pledge or the time of redemption. For that reason a pawnbroker need not complete a registration form. However, the pledgor should leave his registration certificate along with the firearm with the pawnbroker, in that section 11.1-8 of the Registration of Firearms Ordinance requires that the registration certificate "shall be carried simultaneously with the firearm and shall be exhibited to any police officer upon his demand for inspection."

SPECIAL POLICEMEN

(Superintendent of Police and Fire Prevention, Chicago, Milwaukee, St. Paul and Pacific Railroad Company—M. E. A.—March 26, 1968)

The recently enacted firearms registration ordinance (Chapter 11.1 of the Municipal Code of the City of Chicago) does not exempt Special Policemen from the registration requirements.

PRIVATE OFFICERS

(S. C. M.—W. J. K.—April 17, 1969)

In your letter addressed to this office you state you represent "The Associated Detectives of Illinois, Inc., an association of private investigators, watchmen, guards and patrolmen," and your client calls attention to "two inconsistent and confusing statutes enacted by the 1967 State Legislature" and "has caused great concern to the membership" has been turned over to the undersigned for reply.

The two statutes referred to in your letter relate to exemptions as to the offense of unlawful use of weapons specifically, Illinois Revised Statutes, 1967, paragraphs 24-1 (a) (3) and (4) (carrying concealed weapons about his person or concealed in any vehicle and are referred to as Senate Bill 523 and Senate Bill 1367.

In a recent case, *Star Detective and Security Agency, Inc.*, v. *Conlisk*, 68 CH 2371, the same issues raised in your letter were decided adversely to Star Detective and Security Agency, Inc. The Court held that Senate Bill 1367 is in full force and effect and that plaintiff, Star Detective and Security Agency, Inc., its officers and employees are not exempt from provisions of paragraph 24-1, subsection (a) (3) and (4) of Chapter 38 of the Illinois Revised Statutes of 1967, *"while commuting between their homes and places of employment,"* but are exempt only while actually engaged in the performance of the duties of their employment.

A notice of appeal was served upon this office by plaintiff's attorney which is still pending in the Appellate Court.

WATCHMEN AND PRIVATE GUARDS

(Director of Security, Zenith Radio Corp.—M. E. A.—June 3, 1968)

Reference is made to your letter of May 24, 1968 in which you request our opinion as to the possession of firearms by watchmen of your corporation and by personnel of private guarding services employed by you.

Please be advised that City law exempts your watchmen and employees of a private guarding service from the prohibition against carrying firearms "while actually engaged in the performance of the duties of their employment or commuting between their homes and places of employment". Section 11.2-1 (4) of the Municipal Code of the City of Chicago. State law exempts watchmen from the prohibition against carrying concealed firearms "while actually in the performance of the duties of their employment". Ill. Rev. Stat. 1967, ch. 38, §24-2.

Therefore, you may arm your plant protection personnel on duty in facilities within the corporate limits of the City of Chicago. However, since these firearms are owned and possessed by the Zenith Radio Corporation within the City of Chicago, they should be registered in accordance with Chapter 11.1 of the Municipal Code of the City of Chicago.

CARRYING OF FIREARMS BY WATCHMEN

(Superintendent of Police—M. E. A.—May 16, 1968)

In response to the telephone conversation between your aide and legal coordinator, Charles Finston, and the undersigned today, this letter supplements and supersedes our letter to you of May 7, 1968.

You are correct in noting that Section 11.2-1 (4) of the Municipal Code of the City of Chicago, which creates an exemption for watchmen from the penalty provisions of Chapter 11.2, was amended prior to passage to read as follows:

> "(4) Special agents employed by a railroad to perform police functions, or employees of a detective agency, watchman-guard or patrolman agency, licensed by the State of Illinois, while actually engaged in the performance of the duties of their employment to or commuting between their homes and places of employment."

You are also correct in noting that there were two amendments to Section 24-2 of the Illinois Criminal Code (Senate Bill Nos. 523 and 1367) at the last session of the Illinois General Assembly. As I indicated to you in my letter of May 7, 1968, it is our opinion that Senate Bill No. 1367 is controlling as to the language of Subsection 24-2 (a) (4), which creates an exemption for watchmen from the penalty provisions of Section 24-2. The pertinent language reads as follows:

> "(4) Special agents employed by a railroad to perform police functions while actually engaged in the performance of the duties of their employment or commuting between their homes and places of employment; watchmen while actually engaged in the performance of the duties of their employment."

There is, therefore, a conflict between State and City law as to the scope of the exemption for watchmen. However, the conflict is not irreconcilable.

Under State law (subsection 24-2 (a) (4) of the Illinois Criminal Code), a watchman while actually engaged in the performance of his duties of his employment is exempt from the prohibition against carrying a firearm *concealed* on his person or in his auto. There is no similar exemption for carrying the weapon from his home to his place of employment.

Under City law (Section 11.2-1(4) of the Municipal Code of the City of Chicago), watchmen while actually engaged in the performance of their duties of their employment *or commuting between their homes and places of employment* are exempt from the prohibition against carrying a firearm, *whether concealed or not.*

Therefore, a watchman may carry a firearm between his home and place of employment without violating City law. However, by so doing, he would be violating State law only if the weapon is concealed on his person or in his auto. There would be no violation if the transportation of the firearm is done in a broken down state or if the firearm is not immediately accessible (Section 24-2 (b) (4) of the Illinois Criminal Code).

As to what constitutes "concealed" and "not immediately accessible", we refer you to the following Illinois cases discussing this question:

> 1. Gun, which slid forward on floor from its position under front seat of compact automobile when defendant was required to stop his automobile by police officers who were on lookout for burglary suspect driving vehicle of that type, was not accessible to defendant, who was a stout man and could not readily reach down from his position behind wheel, nor

was it concealed on or about his person, and defendant was not guilty of unlawfully carrying pistol concealed on or about his person. *People* v. *Adams,* 1962, 39 Ill. App. 2d 19, 187 N.E. 2d 326.

2. Pistol which was in closed zipper bag beside defendant on front seat of parked automobile was concealed on or about his person. In order for weapon to be on or about a person, weapon must be located either on person or in such close proximity that it can be reached without a material or appreciable change in his position and weapon must be readily accessible when such person reaches to where it is located. *People* v. *Foster,* 1961, 32 Ill. App. 2d 462, 178 N.E. 2d 402.

3. Concealment and accessibility are essential elements of crime of carrying a concealed weapon on or about the person and weapon must be in such proximity of accused as to be within his easy reach and under his control and must be sufficiently close to the person to be readily accessible for immediate use. Where defendant placed loaded revolver wrapped in large towel under driver's seat of automobile, about four inches from front of seat, weapon was not readily available for use or in such close proximity that it could be readily used as though on the person and defendant was not guilty of carrying a concealed weapon on or about his person. *People* v. *McClendon,* 1959, 23 Ill. App. 2d 10, 161 N.E. 2d 584.

4. The weapon must be actually concealed on the person or in such close proximity that it can be readily used as though on the person without appreciable change in his position. Presence of automatic pistol in three-inch space beneath front seat of automobile approximately six inches from front of seat was insufficient to justify conviction of driver of carrying a pistol concealed on or about his person, since it did not appear that pistol could be readily used by driver without appreciable change in his position, particularly where evidence that driver did not own automobile and did not know that pistol was in it was not contradicted. *People* v. *Liss,* 1950, 406 Ill. 419, 94 N.E. 2d 320.

5. Law does not require that the firearm be carried in such manner as to give absolutely no notice of its presence, but merely requires that it be concealed from ordinary observation. *People* v. *Euctice,* 1939, 371 Ill. 159, 20 N.E. 2d 83.

6. Carrying and drawing a gun is not a lawful act. *People* v. *Wade,* 1966, 71 Ill. App. 2d 202, 217 N.E. 2d 329.

The gist of these cases is that the firearm is not "concealed" if any part of it is clearly visible to the naked eye and is recognizable as a firearm; the firearm is "accessible" if the possessor can readily exert control over it with little effort.

We hope this letter clears up any confusion as to the operation of the new City law and the recently amended State law relating to possession of firearms by watchmen. If there are any further questions, we will be happy to answer them.

"NARCOTICS ADDICT"—REVOCATION

(Superintendent of Police—R. F. F.—November 10, 1971)

This is in answer to your inquiry of May 11, 1971, in which you ask the propriety of revoking the City firearm registration for a certain individual. You asked whether the registration may be revoked pursuant to Chapter 11.1-15 of the Municipal Code of Chicago, which provides that a "narcotic addict" is ineligible to register.

The arrest and conviction record for this registrant was attached to your letter. It is noted that although a large number of arrests are listed (including arrests for narcotics violations), this individual was never *convicted* for any nar-

cotic-related offense. A mere narcotics arrest is not sufficient cause for revocation of registration.

However, your letter also states that the registrant is a user of cocaine. Proven use of such a drug is sufficient ground to revoke a license. The Uniform Narcotic Drug Act, section 2-17(5) (Ill. Rev. Stat. 1969, ch. 38 par. 22-2-17(5)) includes cocaine among prohibited narcotic drugs. Although "addict" is not defined in chapter 11.1 of the Municipal Code, the Uniform Narcotic Drug Act defines "addict" as "any person who unlawfully uses any narcotic drug" (section 2.18). If there is sufficient evidence to show the registrant is a user of narcotics, his registration is properly revoked.

A notice was sent to the registrant informing him that his registration had been revoked; his attorney requested a hearing on this revocation. According to section 11.1-9 of the Municipal Code, a hearing may be held to determine the propriety of the revocation. At such hearing evidence concerning the registrant's narcotics use may be presented.

SALE OF AIR RIFLES

(Alderman of the Tenth Ward—R. F. F.—March 14, 1973)

This is in response to your inquiry whether it is legal to sell pellet or B-B guns within the City of Chicago. Under the provisions of Chapter 183 of the Municipal Code of Chicago, section 10 *et seq.*, only adults (persons eighteen years of age and older) may purchase such weapons, subject to the following restrictions.

It is unlawful to sell an air rifle without first securing a license to sell these weapons (section 183-10). Further, under section 183-14 of the Municipal Code, no one may purchase an air rifle without first being issued a permit from the Superintendent of Police. The Superintendent, under section 183-15 must not issue a permit to anyone who is not of good moral character or who has been convicted of a crime or who is a minor. Furthermore, it is unlawful to discharge an air rifle within the City of Chicago (section 193-13 of the Municipal Code).

In addition, it should be noted that the Illinois Criminal Code makes the sale by dealers of air rifles (the definition of which includes B-B guns) to children under 13 years of age a misdemeanor (Ill. Rev. Stat. 1971, ch. 38, par. 82).

If we may be of further assistance, please let us know.

TEAR GAS GUN

(A. C.—M. C. P.—February 16, 1968)

Your communication of February 6, 1968, addressed to the Chicago Police Department has been forwarded to the undersigned for reply.

The intended Tear Gas Gun or Mace that you desire to carry on your person would be contrary to law.

Chapter 99-53 of the Municipal Code of Chicago states "It shall be unlawful for any person to have on his person any corrosive or caustic acid * * * * or any other nauseous, offensive or filthy substance * * * *.

Chapter 38, Section 24-1 of the Illinois Revised Statutes, 1967, states as follows:

"(a) A person commits the offense of unlawful use of weapons when he knowingly:

* * * * *

"(3) Carries on or about his person or in any vehicle, a tear gas gun projector or bomb or any object containing noxious liquid gas or substance; * * * *."

SLINGSHOTS AND CROSSBOWS

(L. J. T.—M. H. B.—December 11, 1967)

Mayor Richard J. Daley has directed this office to reply to your letter in which you ask if the sale of sling shots and cross bows over the counter are legal.

The sale of sling shots are expressly prohibited by the Municipal Code of City of Chicago Chapter 193, Section 30. Since a cross bow can be categorized as a deadly weapon, the sale thereof also is prohibited by city ordinance.

"LIQUID KARATE"

(C. F. S.—H. L. R.—August 8, 1968)

Your letter to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response. You ask whether there are any legal objections to the distribution and sale of a product known as "Liquid Karate". You describe "Liquid Karate" as being a "self-defense spray".

Chapter 38, paragraph 24-1(a)(1) of the Illinois Revised Statutes (1967) states that a person commits the offense of unlawful use of weapons when he knowingly "[C]arries on or about his person or in any vehicle, a tear gas gun projector or bomb or any object containing noxious liquid gas or substance."

Whether your product fits within the above-mentioned paragraph is a matter for your private counsel to investigate and determine.

TEAR GAS PENS

(R. Z.—K. J. S.—March 29, 1968)

Your question on Tear Gas pens are answered in Chapter 99 Section 53 of the City of Chicago Ordinances.

"It shall be unlawful for any person to have in his possession, or for any person to carry about—any corrosive or caustic acid, phosphorus, or any solution or mixture thereof, or any hydrogen sulphide, valerianic acid, ammonium valerianate, valerianate of zinc, or any other nauseous, offensive, or filthy substance of like or similar nature; provided, that this provision shall not apply to manufacturing and wholesale druggists, physicians, chemists, regularly established laboratories, or to persons who have procured any of said substances for medicinal purposes upon a prescription of a physician regularly licensed under the laws of the state."

Section C. GAMBLING AND LOTTERIES

DISPOSITION OF MONEY SEIZED IN GAMBLING RAID

(Superintendent of Police—H. N. L.—July 7, 1972)

This letter is in response to your inquiry of June 6, 1972, concerning the proper disposition of money seized in a gambling raid at the residence of Aultee Warr at 6933 S. Indiana.

Section 28-5(b) of the Illinois Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 28-5) provides the following:

> "Every gambling device shall be seized and forfeited as contraband to the county wherein such seizure occurs. Any money or other thing of value integrally related to acts of gambling shall be seized and forfeited as contraband to the county wherein such seizure occurs."

A distinction must necessarily be drawn here between property which is contraband per se and property which must be adjudicated contraband.

There is little doubt that gambling implements and apparatus such as slot machines and other such devices are, because of their intrinsic relationship to the act of gambling, contraband. Consequently, such property may be confiscated and destroyed by the State without violation of any constitutional provision. (*Prost* v. *People*, 193 Ill. 635 (1901)).

However, money, as such, is not ordinarily an article of contraband i.e., it is not contraband per se. It may become contraband if it is found that "it constitutes a functional, integral part of a gambling operation." (*People* v. *Moore*, 410 Ill. 241, 250 (1951)).

Since there was no disposition of the cash seized in the Warr case on the trial level the money seized cannot be considered contraband unless and until it is adjudicated contraband by some court. The City is consequently acting as bailee pending such final disposition of the cash. We suggest the City file an interpleadar action pursuant to the provisions of Chapter 110, Section 26.2, Illinois Civil Practice Act, and allow the court to determine custody of the moneys. In this way, the interests of the City would be properly protected whether the money is adjudicated contraband, in which case the county would be entitled to the funds, or whether the money is not adjudicated contraband, in which case the Internal Revenue Service would be entitled to the funds pursuant to their lien.

Section D. OTHER HEALTH AND WELFARE REGULATIONS

TELEPHONE SOLICITATION

(D. Z.—M. S. J.—July 13, 1967)

Mayor Richard J. Daley has directed this office to consider your recent letter to him. In your letter you state that your Parish plans a fund raising drive to provide money for your schools. You desire information to to the procedures to be followed in regard to your solicitations by telephone for advertisements in a souvenir program book prior to your Country and Western Show at the National Guard Armory at North Avenue and Kedzie on December 22, 1967.

We find no city ordinance concerning telephone solicitations for souvenir program books. Consequently, no registration is necessary at City Hall.

We caution you, however, that pursuant to the Municipal Code of Chicago Chapter 36, section 36-11 to 36-18, inclusive, you are prohibited from making solicitations on the public way except on tag days approved by the City Council.

You might also wish to consult with the office of the Illinois Attorney General, 160 N. LaSalle Street, Chicago, Illinois, telephone Number 346-2000 to determine your responsibilities under state law.

AIR CONDITIONERS

(S. J. S.—R. N. K.—September 19, 1968)

Your letter of September 16, 1968, addressed to the Corporation Counsel of the City of Chicago, has been referred to the undersigned for response. In your letter, you state that your neighbor's air conditioner operates from 8:00 P.M. to 7:00 A.M. and the proximity of this air conditioner has disturbed your sleep. You inquire as to whether the City of Chicago has an ordinance regulating air conditioners.

The Municipal Code of Chicago, Chapter 99, Section 99-61 which provides that no person in possession or control of any building or premises shall use the same for any purpose, if such use shall, by its boisterous nature, disturb or destroy the peace of the neighborhood in which such building or premise is situated, may apply in your case, depending upon the specific facts.

We are sending you a copy of this section as you request.

Your own attorney, upon investigation of the circumstances, will be able to advise you as to your rights and remedies.

AIR CONDITIONERS

(W. L.—R. N. K.—October 1, 1968)

Your recent letter addressed to the Corporation Counsel of the City of Chicago, has been referred to the undersigned for response. In your letter, you request information covering the regulation of air conditioners, specifically in reference to location of their installation and health hazards of exhaust.

The Municipal Code of Chicago, Chapter 81, Section 81-11, provides in part that the air removed by every mechanical ventilating exhaust system shall be discharged out-of-doors at a point where it will not cause a nuisance, and from which it cannot again be readily drawn in by a ventilating system.

Chapter 99, Section 99-61, of the Municipal Code of Chicago may also apply to the operation of air conditioners. This section provides that no person in possession or control of any building or premises shall use the same for any purpose, if such use shall, by its boisterous nature, disturb or destroy the peace of the neighborhood in which such building or premise is situated.

CONSUMER BEER TASTE TEST

(Administrative Assistant To The Mayor—M. J. D.—September 22, 1971)

We have your letter of September 8, 1971 in which you ask our opinion of a request made by Marketing Metrics, Inc. to conduct a consumer beer taste test in the City of Chicago. Chapter 147, Sections 147-1 and 147-2 of the Municipal Code of Chicago provide as follows:

> 147-1. "All words and phrases used in this chapter which are defined in an act entitled 'An Act relating to alcoholic liquors,' approved January 31, 1934, as amended shall have the meaning accorded to such words and phrases in said act."
>
> 147-2. "No person shall sell at retail any alcoholic liquor without first having obtained a city retailer's license for each location, place, or premises where the retailer is located to sell the same.
>
> "Where two or more such locations, places, or premises are under the same roof or at one street address, a separate city retailer's license shall be obtained for each such location, place, or premise; provided that nothing herein contained shall be so construed as to prevent any hotel operator licensed under the provisions of this chapter from serving alcoholic liquor to his registered guests in any room or part of his hotel, if such liquor so served shall be kept in and served from a licensed location, place, or premise in said hotel.
>
> "The issuance to or possession by any person of a retail liquor dealer tax stamp issued for a then-existing tax period by the United States government or any of its agencies shall be and constitute prima facie evidence that such person is subject to the provisions of this chapter."

Section 147-2 of the Municipal Code of Chicago requires a retail liquor license for any sale at retail of alcoholic liquor within the City of Chicago. Section 147-1 of the Municipal Code of Chicago provides that Chapter 43, Ill. Rev. Stat. (1969), Illinois Liquor Control Act, shall be used to define all words and phrases appearing in the said chapter of the Municipal Code of Chicago. Chapter 43, Paragraph 95.21, Illinois Revised Statutes (1969), Illinois Liquor Control Act, Article I, Section 2.21 provides as follows:

> "Sale defined.] § 2.21 'Sale' means any transfer, exchange or barter in any manner, or by any means whatsoever, including the transfer of alcoholic liquors by and through the transfer or negotiation of warehouse receipts or certificates, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee. The term 'sale' includes any transfer of alcoholic liquor from a foreign importer's license to an importing distributor's license even if both licenses are held by the same person."

The contemplated consumer beer taste test would constitute a sale within the meaning of the above cited definition under Chapter 43 of the Illinois Revised Statutes (1969). Therefore, it is our opinion that a City of Chicago retail liquor license is required for the said testing. A separate license would be required for each location where the testing is to occur as provided in Chapter 47, Section 147-2 of the Municipal Code of Chicago. The applicant and premises to be used must conform to all requirements set forth in the Illinois Revised Statutes and Municipal Code of Chicago for said retail liquor license.

In addition, Marketing Metrics, Inc. proposes to conduct a portion of its testing program in the recreation room of an apartment complex. Chapter 43, Paragraph 141, Ill. Rev. Stat. (1969), Illinois Liquor Control Act, Article VI, Section 20 provides as follows:

> "In premises upon which the sale of alcoholic liquor for consumption upon the premises is licensed, other than as a restaurant, hotel, club or any bowling establishment, no screen, blind, curtain, partition, article or thing shall be permitted in the windows or upon the doors of such licensed premises nor inside such premises, which shall prevent a clear view into the interior of such licensed premises from the street, road or sidewalk at all times, and no booth, screen, partition, or other obstruction nor any arrangements of lights or lighting shall be permitted in or about the interior of the licensed premises which shall prevent a full view of the entire interior of such premises from the street, road or sidewalk, and the premises must be so located that there shall be a full view of the entire interior of such premises from the street, road or sidewalk. All rooms where liquor is sold for consumption upon the premises shall be continuously lighted during business hours by natural light or artificial white light so that all parts of the interior of the premises are clearly visible. In case the view into any licensed premises required by the foregoing provision, is wilfully obscured by the licensee or by him wilfully suffered to be obscured or in any manner obstructed, then such license is subject to revocation in the manner herein provided. In order to enforce the provisions of this Section the local commission has the right to require the filing with it of plans, drawings and photographs showing the clearance of view as above required."

The aforementioned section requires an unobstructed view of a licensed premises from the street, road, or sidewalk. The only exceptions to that requirement are a restaurant, hotel, club, or bowling establishment. There is no exception set forth relating to a recreation room in an apartment complex.

Therefore, in our opinion Section 20 would prohibit the issuance of a retail liquor license for a beer tasting test in the recreation room of an apartment complex.

25th PRECINCT OF THE 4th WARD GOES DRY

(Mayor and Local Liquor Control Commissioner—L. H. G.—August 29, 1967)

The above-entitled matter originated as a suit contesting the petition to place a Local Option proposition on the ballot in the 25th Precinct of the 4th Ward. This proposition was presented to the voters of said Precinct at the April 4, 1967, election and was worded, "Shall the sale at retail of alcoholic liquor be prohibited in the 25th Precinct of the 4th Ward." The result of this Local Option Election was 197 voters voting "Yes" and 109 voters voting "No" on the proposition.

On March 30, 1967, Judge Thomas C. Donovan entered an order that the petition of the plaintiffs to keep said proposition from the ballot be dismissed.

On May 1, 1967, plaintiffs filed a petition for a rehearing, which was denied by Judge Donovan on June 26, 1967.

Mr. Samuel Turner and others, by Attorney Thomas Nash, filed a petition to intervene and opposed the petition for rehearing.

July 24, 1967, plaintiffs filed a Notice of Appeal from the order of June 26, 1967.

Plaintiffs have not secured a supersedeas and it is therefore our opinion that the 25th Precinct of the 4th Ward has been adjudicated dry territory, and we suggest that you notify the proper authorities to enforce the result of said Local Option Election in the 25th Precinct of the 4th Ward.

MINORS AND WOMEN

(Marriott-Hot Shoppes—B. H. G.—October 10, 1967)

Your recent letter to the City Clerk of the City of Chicago has been forwarded to me for reply. The Illinois Revised Statutes provide in Chapter 48, Paragraph 31.7:

> "No minor under the age of sixteen (16) years of age shall be employed, permitted or suffered to work: * * * 13. In any place or establishment in which intoxicating alcoholic liquors are served or sold for consumption on the premises, or in which such liquors are manufactured or bottled; * * *"

and Chapter 43, Paragraph 110 provides:

> "* * * to prohibit any woman or minor, other than a licensee or the wife of a licensee, from drawing, pouring, or mixing any alcoholic liquor as an employee of any retail licensee; and to prohibit any minor from at any time attending any bar and from drawing, pouring or mixing any alcoholic liquor in any licensed retail premises; and to establish such further regulations and restrictions upon the issuance of and operations under local licenses not inconsistent with law as the public good and convenience may require; * * *"

The Municipal Code of the City of Chicago, under Section 147-14 provides:

> "It shall be unlawful for any licensee or any officer, associate, member, representative, agent or employee of such licensee to sell, give or deliver alcoholic liquor to any minor. It shall also be unlawful for any such person to engage or employ or permit any minor to work or to entertain, or to act as host or hostess in or upon the licensed premises where the principal business is the sale of alcoholic liquor, while such premises are open for the sale at retail of alcoholic liquor. Any minor engaged or employed or permitted to work in or upon the licensed premises where the sale of alcoholic liquor is not the main or principal business may not work as entertainer, host or hostess or in connection with the handling, selling, serving or delivering of alcoholic liquor."

This office is prohibited by ordinance from advising persons other than city government personnel as to the effect of law. I therefore suggest that you consult your attorney for his interpretation of the foregoing statutory and ordinance provisions.

SALE OF ALCOHOLIC BEVERAGES BEFORE NOON ON SUNDAYS

(City Collector—M. J. D.—October 13, 1971)

We have your letter dated October 5, 1971, in which you ask our opinion of the following questions:

1. Is there a sale according to law when an order for alcoholic liquor is taken and payment therefor is accepted before noon?

2. Is the issuance of a receipt as a claim check for a specific alcoholic drink evidence of a sale of alcoholic liquor before noon even though delivery of the alcoholic drink is made after 12:00 o'clock noon?

3. Is the proposed operation of the business as described permissible and within the applicable provisions of the Municipal Code of Chicago and not against public policy?

In answer to the aforementioned questions, Chapter 147, Section 147-1 of the Municipal Code of Chicago provides as follows:

147-1. All words and phrases used in this chapter which are defined in an act entitled "An Act relating to alcoholic liquors," approved January 31, 1934, as amended, shall have the meaning accorded to such words and phrases in said act.

Section 147-1 of the Municipal Code of Chicago, provides that Chapter 43 Illinois Revised Statutes (1969) Illinois Liquor Control Act, shall be used to define all words and phrases appearing in the said Chapter of the Municipal Code of Chicago, Chapter 43, Paragraphs 95.21 and 95.22 of the Illinois Revised Statutes (1969), Illinois Liquor Control Act, Article I, Sections 2.21 and 2.22 provide as follows:

Sale defined.] §2.21 "Sale" means any transfer, exchange or barter in any manner, or by any means whatsoever, including the transfer of alcoholic liquors by and through the transfer or negotiation of warehouse receipts or certificates, and includes and means all sales made by any person, whether principal, proprietor, agent, servant, or employee. The term "sale" includes any transfer of alcoholic liquor from a foreign importer's license to an importing distributor's license even if both licenses are held by the same person. As amended by act approved April 29, 1965. L.1965, p. 433. Emergency. Effective April 29, 1965.

To sell defined.] §2.22 "To sell" includes to keep or expose for sale and to keep with intent to sell. Added by act approved Aug. 3, 1949. L.1949, p. 804.

The order and payment for an alcoholic beverage with actual delivery to be made at a future time would constitute a sale within the meaning of §2.21 regardless of the time of delivery. The sale is consummated at the time the order and payment are made. The sale is partly executed as to the purchaser in that he had nothing remaining to do except receive delivery of the alcoholic beverage from the seller. The sale is partly executory as to the seller in that he has an obligation to perform an act in the future, i.e., the delivery of the alcoholic beverage to the purchaser.

The issuance of a claim check subsequent to the order and payment for the alcoholic beverage would be evidence of the aforementioned sale irrespective of the time of delivery of said beverage.

Chapter 147, Section 147-13 of the Municipal Code of Chicago, provides in part:

147-13. No person licensed hereunder as a retailer of alcoholic liquor shall sell, permit to be sold, or give away any alcoholic liquor between the hours of two o'clock a.m. and seven o'clock a.m. on week days and between the hours of three o'clock a.m. and twelve o'clock noon on Sundays.

Any person licensed hereunder as a retailer of alcoholic liquor may sell at retail any alcoholic liquor on Sundays until the hours of three o'clock a.m. and between the hours of twelve o'clock noon and midnight.

During such prohibited hours of sale, every location, place, or premises where alcoholic liquor may be sold at retail shall be kept closed, and no person other than the licensee or any employee or a member of the immediate family of the licensee shall be permitted to remain therein. All

doors directly opening into or out of such location, place or premise for ingress thereto or egress therefrom shall be securely locked during the prohibited hours of sale. The provisions of this section relating to the closing of the premises and the locking of the doors shall not apply to restaurants and hotels licensed as food dispensers nor to clubs, drug stores, and delicatessen stores.

Therefore, in our opinion Section 147-13 of the Municipal Code would prohibit the contemplated sale of alcoholic beverages before 12:00 noon on Sundays in the City of Chicago.

CLOSING LIQUOR PREMISES DURING POLLING HOURS

(Administrative Assistant to the Mayor—R. N. K.—December 1, 1970)

Your recent inter-office communication addressed to Mr. Richard L. Curry, Corporation Counsel, has been referred to the undersigned for response. You request an opinion as to whether licensed liquor premises in the City of Chicago are to remain closed during polling hours on December 15, 1970, the date of the Election concerning the Constitution of the State of Illinois.

Chapter 43, paragraph 129 of the Illinois Revised Statutes of 1969, provides in part that no person shall sell at retail any alcoholic liquor on the day of any National, State, Court or Municipal election, including primary elections, during the hours the polls are open, within the political area in which such election is being held.

Since the Election being held on December 15, 1970 is a State election, the provisions of paragraph 129, are applicable and retail liquor premises in the City of Chicago should remain closed during polling hours on said date.

BRINGING LIQUOR INTO RESTAURANTS

(J. B.—C. J. O'C.—November 21, 1967)

Your letter addressed to the Mayor's Office of Inquiry and Information has been referred to our office for reply. In your letter you ask if it is permissable to bring packaged liquor or beer into a restaurant that does not sell these items. If there is no objection on the part of the management of the restaurant, you are permitted to bring alcoholic beverages into the premises with you. However, you should note that the law prohibits the transporting in an automobile of alcoholic beverages in a container with its seal broken.

WILD ANIMALS

(City Attorney, Kalamazoo, Michigan—M. C. H.—May 28, 1968)

We acknowledge the receipt of your letter to this office in which you request a copy of our ordinance prohibiting the keeping of dangerous or wild animals within our city limits, except under prescribed conditions.

We find the following provision in Section 98-14 of the Municipal Code of the City of Chicago, which reads as follows:

> "No person shall permit any dangerous animals to roam at large, nor leave any such animal with a chain, rope, or other appliance, whether such animal be muzzled or unmuzzled, in any public way or public place within the city under a penalty of not more than ten dollars for each offense."

We also find the following provision in Section 99-6 of the Municipal Code of Chicago, which reads as follows:

> "No person shall bring into the city or keep therein for sale or otherwise, either for food, or for any other purpose, any dead or live animal nor any matter, substance, or thing which shall be a nuisance or which shall occasion a nuisance within the city, or which may or shall be detrimental to health."

CONFINEMENT PERIOD FOR BITING ANIMALS

(Superintendent, University of Chicago, Central Animal Quarters—M. C. H.—September 13, 1967)

This is to acknowledge the receipt of your letter to this office in which inquiry is made whether or not the proper procedure for confinement is to follow the City Ordinance which provides for a confinement of 15 days of a biting animal, or 10 days as provided by the Illinois Statutes.

The Supreme Court of the State of Illinois in the case of *Kizer* v. *City of Mattoon*, 332 Ill. at page 549, held as follows:

> "* * * While municipal ordinances must be in harmony with the general laws of the State and in case of a conflict the ordinance must give way, the mere fact that the State has legislated upon a subject does not necessarily deprive a City of power to deal with the subject by ordinance, provided they are not inconsistent herewith. Police regulations enacted by a city under a general grant of power *may differ* from those of the state upon the same subject, provided they are not inconsistent therewith * * *" (Underscoring supplied.)

See also *City of Chicago* v. *The Union Ice Cream Manufacturing Company* 252 Illinois, starting at page 311.

In view of the above, it is our opinion that the ordinance which provides that a biting dog must be kept in the Dog Pound for observation for 15 days must be enforced within the jurisdiction of the City limits notwithstanding the 10 day provision in the Illinois Statutes.

HIGH PRESSURE BOILER LEFT UNATTENDED

(W. G. N.—R. D. W.—July 10, 1969)

Your recent letter addressed to the Law Department has been referred to the undersigned for reply. You ask when and under what circumstances a high pressure boiler can be left unattended by an operating engineer, particularly a high pressure boiler of 115 pounds of steam per square inch.

You may wish to take note of certain provisions appearing in the Municipal Code of Chicago relating to the problem set forth above. Section 174-2 of the Municipal Code provides:

> "No steam engine or boiler subject to the provisions of this chapter shall be used, managed, or operated, except by an engineer or boiler or water tender who shall have been duly licensed and who shall have and exhibit a certificate thereof.
>
> "No individual shall take charge of, manage, or operate any steam engine or boiler, or any portion of a steam plant, in the city without a license, as provided by this chapter.
>
> "Engineers in charge of locomotives and engineers or boiler or water tenders in charge of boilers carrying not more than ten pounds pressure of steam per square inch shall be exempt from the provisions of this chapter . . . [penalty provisions omitted]."

Further, Section 174-9 of the Municipal Code of Chicago provides:

"It shall be the duty of the board of examiners to see that *each boiler plant in the city shall have a licensed engineer, or boiler or water tender, or both, as provided herein, in charge at all times when working under pressure,* whose certificate of qualification shall be displayed in a conspicuous place in the engine or boiler room, and *each engineer or boiler or water tender shall devote his entire time, while boilers are working under pressure, to the duties*

We trust the foregoing information will be of assistance to you.
of the plant under his charge." (Emphasis added).

CIGARETTE MACHINES IN CITY COLLEGES

(Administrative Assistant to the Mayor—F. V. K.—March 4, 1970)

Your interoffice communication directed to the office of the Corporation Counsel, has been referred to the undersigned for response. You refer to a letter you received from Mr. Roger J. Kiley, Jr., the Board Attorney, for the Chicago City College requesting you to give the Chicago City College any consideration possible towards granting licenses for two "direct drop" cigarette machines to be located at Malcolm X College, one of the College's Campuses. You request an opinion as to whether Chapter 178, Section 178-23 of the Municipal Code of Chicago prevents the issuance of the said licenses.

Section 178-23 of the Municipal Code of Chicago aforesaid states in part: "To promote the public health, safety, morals and general welfare, to prevent the sale of cigarettes to minors under eighteen years of age and to minimize the problems of enforcement under this ordinance, *no cigarette-vending machine shall be installed or used any place except and save only rooms or areas of industrial, commercial and mercantile establishments to which members of the general public are not invited or do not have access and where such machines shall be available for the use and convenience of the employees of such establishments. Every such machine installed or used on premises where minors under the age of eighteen are employed shall be under the constant supervision and surveilance of a responsible adult*". (Emphasis Added).

The problem sought to be prevented and the policy behind the above cited ordinance was discussed by the United States Court of Appeals for the 7th Circuit in *Illinois Cigarette Service* v. *Chicago,* 89F, 2d 610 (7th Cir. 1937). In that case the court stated at page 612:

"The evil sought to be reached by forbidding the sale of cigarettes in automatic vending machines was the purchase of cigarettes by immature minors. Automatic vending machines, in order to achieve their purpose, namely, dispensing with salesmen and making facile the purchase of goods without the intervention of human service, are placed in localities easily accessible to the public, are inanimate and automatic, and respond equally efficiently to coins placed therein by a boy or girl as to coins inserted by an adult."

To enhance the intent and effect of the above cited ordinance, specific areas are named in the ordinance where cigarette machines can be placed. The student lounge areas of the Malcolm X College do not fall into either the industrial, commercial or mercantile areas provided by the ordinance. Further, no form of supervision is contemplated as required by the ordinance where those under 18 years of age are present. The student lounge areas of the Malcom X College are public areas accessible to the general public at large. The fact that the school has few, if any, students under the age of 18, does not mean that people under the age of 18 cannot or do not frequent the lounge areas.

Since placing the machines in the lounge areas clearly falls within the prohibition contemplated by the above ordinance, it is the opinion of this office that licenses to operate "direct drop" cigarette machines in the student lounge areas of the Malcolm X College would be contrary to law.

The letter from Mr. Kiley only refers to "direct drop" cigarette machines. The Chicago City College can avoid the prohibition of Section 178-23 by installing a "coin-remote control cigarette vending machine" in the cafeteria where the cashier would be in position to operate the mechanisms. Machines such as these have been held not to be cigarette-vending machines as contemplated by Section 178-23. *Pressley* v. *City of Chicago,* 26 Ill. App. 2d 283.

DISORDERLY CONDUCT ORDINANCES

(Alderman—49th Ward—S. R. D.—August 28, 1967)

We acknowledge receipt of your recent communication transmitting certain provisions of a City of Marion, Massachusetts ordinance pertaining to disorderly conduct, loitering and alcoholic beverages as they relate to minors. You request our "suggestions on this type of ordinance."

The topics contained in these provisions are covered by existing ordinances of the City of Chicago. Article XVIII of the Marion, Massachusetts ordinance relating to behavior in a disorderly manner, use of indecent or insulting language and shouting, screaming or uttering loud outcries without reasonable cause is covered in Sections 192-7 and 193-1 of the Municipal Code of Chicago.

Article XX of the Marion, Massachusetts ordinance pertaining to the consumption by a minor of alcoholic beverage on a public way or in a public place is similar to Sections 147-14, 190-4 and 193-1.2(a) of the Municipal Code of Chicago. A minor would be included in the word "person" as used in Section 193-1.2(a).

Loitering is covered in Sections 193-1 and 193-3 of the Municipal Code of Chicago. In our opinion, Article XIX of the Marion, Massachusetts ordinance pertaining to loitering may be unconstitutional by providing for an unlimited discretion "by the owner or occupany [sic] of the premises, or by any constable, watchman employed by the Town, or public officer" to order, without cause, a person to move from certain portions of private premises or any street or public way or public place. Similar language in an ardinance of Birmingham, Alabama was criticized by the United States Supreme Court in the case of *Shuttlesworth* v. *Birmingham* (1965), 382 U. S. 87, 15 L. ed. 2d 176.

In light of the foregoing, it is our opinion that the matters contained in the ordinance of the City of Marion, Massachusetts are amply covered by the existing ordinances of the City of Chicago.

PUBLIC DRUNKENNESS

(Project Director, Commission on Alcoholism—H. Z.—November 2, 1971)

Your letter concerning public drunkenness addressed to the City Attorney has been referred to Mr. Richard L. Curry, Corporation Counsel and directed to the undersigned for reply.

The City of Chicago does not presently have an Ordinance specifically designed to regulate or punish drunkenness. However, by enforcing Sections of several Ordinances, as quoted below, the City of Chicago is well able to control this problem.

Chapter 193 of the Municipal Code of Chicago entitled "Public Peace and Welfare" provides:

Section 193-1.2(a) It shall be unlawful for any person to drink any alcoholic liquor as defined by law on any public way or in or about any motor vehicle upon a public way in the city.

(b) It shall be unlawful for any person to transport, carry, possess or have any alcoholic liquor in or upon or about any motor vehicle upon any public way in the city except in the original package, and with the seal unbroken.

(c) Any person violating any provision of this section shall be fined not less than fifty dollars nor more than two hundred dollars, or shall be punished by imprisonment for a period of six months, or by both such fine and imprisonment. [Passed, Coun. J. 12-10-53, p. 6226; amend. 11-28-56, p. 3563.]

Chapter 37 entitled "Parks, Playgrounds and Airports" provides:

Section 37-9.1 No intoxicated person shall enter, be or remain in any public park, playground or bathing beach, nor shall any person bring into, sell, give away or drink any intoxicating liquors in any public park, playground or bathing beach. [Passed. Coun. J. 7-2-53, p. 5146.]

Section 190-4 of Chapter 190 entitled "Minors", of the Municipal Code of Chicago states:

190-4. Any minor who shall be intoxicated, or who shall purchase, offer to purchase, or in any manner obtain unlawfully for his personal use any intoxicating liquor, shall be fined not more than twenty-five dollars for the first offsense, and not more than one hundred dollars for every subsequent offense.

Enclosed please find a copy of Chapter 147 of the Municipal Code of Chicago entitled "Liquor Dealers". Also enclosed is a copy of the Illinois Revised Statutes, 1969, Chapter 42 entitled "Dram Shops" paragraph 131. By virtue of these Laws there is close regulation of the sale of liquor thereby giving the City of Chicago complete and effective regulation of public drunkenness.

DUCK HUNTING IN LAKE MICHIGAN

(R. L. M.—H. L. R.—November 16, 1967)

Your letter of November 10, 1967, addressed to the Corporation Counsel, has been referred to the undersigned for response. In your letter, you inquire into the matter of how far you will have to go into Lake Michigan to legally hunt ducks.

The Municipal Code of Chicago, ch. 193, sec. 193-32, provides as follows:

Any person licensed to hunt under the provisions of an act of the general assembly, entitled "Game Code of Illinois," approved July 8, 1937, may hunt or kill game birds in the open season as provided by the laws of the state, within the following described districts and portions of the city: upon Wolf Lake and along the shores thereof; upon Hyde Lake and along the shores thereof; upon Lake Calumet and along the shores thereof; upon the Calumet river and along the banks thereof.

Provided, however, that no weapons shall be used for the purpose of hunting such birds, or killing or wounding, or attempting to kill or wound such birds, other than a shotgun, and that such shotgun shall not be discharged anywhere within seven hundred and fifty feet of any building or structure designed or intended for human habitation or employment, or to be used as a barn or stable.

Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than twenty-five dollars for each offense.

The Migratory Bird Treaty Act (16 U.S.C.A. 708) gives the State, and through it, the cities, the authority to restrict hunting to the above mentioned sites, as the restrictions given further protection to migratory wildlife.

It follows from the above that you must travel beyond the territorial waters of the City of Chicago. As set out in the Illinois Revised Statutes 1965, ch. 24, par. 7-4-4, the corporate authorities in all municipalities have jurisdiction over all waters bordering upon the City to the extent of 3 miles beyond the corporate limits.

Therefore, you will be able to hunt for ducks outside of this 3 mile area, if not within the corporate limits of another municipality. But, to do so, you must have a state license as is required by Chapter 61, paragraph 186, of the Illinois Revised Statutes, 1965, and also have a Federal migratory bird hunting stamp as is required by the Migratory Bird Hunting Act (16 U.S.C.A. 718 (a)).

REGULATIONS ON SELF-SERVICE COIN-OPERATED LAUNDRIES

(Superintendent, Department of Police—A. H.—October 2, 1967)

This is to advise your Department that the litigation in *Gibbons* v. *City of Chicago* has now been fully concluded. The subject matter of said litigation involved the validity of provisions purporting to regulate self-service, coin-operated laundries in the City of Chicago, said provisions being contained in Section 145-24.1 through 145-24.6 of the Municipal Code of Chicago, as amended. Said provisions were upheld by the Supreme Court of Illinois and are to be considered valid and enforceable in every respect.

As you will note from the provisions aforesaid, among their requirements are that there be present in every self-service, coin-operated establishment of this type an attendant between the hours of 6:00 P.M. and 11:30 P.M. (Sec. 145-24.2); that no person shall act as an attendant unless he shall be the holder of a certificate of fitness issued by the Division Marshal in charge of the Bureau of Fire Prevention and the Commissioner of Health (Sec. 145-24.3); and that no coin-operated, self-service laundry shall be operated between the hours of 11:30 P.M. and 6:30 A.M. (Sec. 145-24.5). The above cited measures are such as will require police enforcement, which we herewith respectfully request.

Since the litigation hereinabove referred to was long and protracted, a period of almost six years, and the City of Chicago has heretofore been enjoined from enforcing the provisions of said ordinance by order of Court, which injunction has now been dissolved, it would appear to be the more equitable practice to advise owners and operators of self-service, coin-operated laundries in the City of Chicago of the dissolution of said injuction and the City's intent to enforce the provisions thereof, and that they be given a reasonable period of time within which to comply before arrests are effected, but in no case to exceed December 31, 1967.

The cooperation of the Chicago Police Department in the *Gibbons* case was splendid and served in large measure to enable this office to sustain the validity of the ordinance, for which we express our sincere appreciation. The cooperation of the Department in the enforcement of these provisions will be equally appreciated.

INTEREST ON SMALL LOANS

(B. G.—M. C. H.—September 21, 1967)

This is to acknowledge the receipt of your letter to this office in which you inquire what the law is on interest rates on small loans.

Please be advised that Section 13 (a) of the Illinois Consumer Finance Act (Ill. Rev. Stat. 1965, Ch. 74, par. 31 (a)) provides as follows:

> "Every licensee hereunder may lend any sum of money not exceeding $800.00 in amount and may charge, contract for, and receive thereon interest at a rate not exceeding 3% per month on any part of the unpaid principal balance of the loan not exceeding $150.00, and 2% per month on that part of the unpaid principal balance exceeding $150.00 and not exceeding $300.00, and 1% per month on any part of the unpaid principal balance exceeding $300.00."

MINIMUM WAGE LAW

(Commisioner, Minimum Wage Commission, Baltimore, Md.—D. P.—March 13, 1968)

Mayor Richard J. Daley has directed this office to consider your recent inquiry as to whether the City of Chicago has a minimum wage law.

Chicago has no ordinance establishing a minimum wage. Any matter of general application affecting employment is within the exclusive jurisdiction of the State of Illinois. We might add parenthetically that the only state enactment in this area goes only as far as permitting the state department of labor to establish "minimum fair wages" for services or classes of service within the department's jurisdiction (Ill. Rev. Stat. 1967, chapter 48, paragraph 198.1 *et seq.*).

MINORS IN PREMISES SELLING LIQUOR

(Administrative Assistant to the Mayor—C. J. O'C.—August 8, 1968)

Your request for an opinion from the Corporation Counsel has been referred to the undersigned for reply. Attached to your request is a letter from Morton Siegel, General Counsel for the Illinois Liquor Stores Association, Inc., addressed to the Honorable Richard J. Daley, Mayor of the City of Chicago. The letter states that the Association is willing to participate in the Mayor's Youth Opportunity Program by providing jobs for young people under the age of twenty-one years. Mr. Siegel correctly states that Chapter 147 Par. 14, of the Municipal Code of the City of Chicago and Article 2 of the Rules and Regulations adopted by the Illinois Liquor Control Commission, prohibit minors from being employed as stock boys, delivery boys, or from being employed "directly or indirectly" in premises selling liquor at retail.

Mr. Siegel is correct in stating that both the ordinance and regulation must be amended or abolished to permit minors to work. A recommendation as to whether changes in the existing law should be made is a policy matter for your deliberation.

CHICAGO v. REID

(City Council—H. C. G.—May 3, 1968)

On May 2, 1968, the Appellate Court of Illinois, First District, sustained the judgment of the trial court finding the defendant, Reid, guilty of a violation of the municipal building code and assessing a fine of $200.00 and costs.

Several technical arguments relating to interrogatories, proof of ownership etc. which were raised by the defendant-appellant were summarily disposed of in the Court's opinion. The opinion re-affirmed the rule that ordinance violation prosecutions are quasi-criminal in character but are subject and tried under the rules of civil procedure. In addition, the opinion re-affirmed the rule that correction of unsafe and dangerous conditions can be enforced in buildings erected prior to the effective date of the applicable ordinance.

CUSACK v. THE TEITEL FILM CORPORATION

(City Council—M. E. A.—October 3, 1967)

On September 29, 1967, the Illinois Supreme Court rendered an opinion affirming the orders of the Circuit Court of Cook County enjoining Teitel Film Corporation and Charles Teitel from exhibiting the motion pictures entitled "Rent-A-Girl" and "Body of a Female" in the City of Chicago.

The actions were brought by the Motion Picture Appeal Board of the City of Chicago pursuant to Chapter 155 of the Municipal Code of the City of Chicago.

The Illinois Supreme Court, in upholding the orders of Circuit Court Judge Cornelius J. Harrington, stated:

(1) Chapter 155 of the Municipal Code of the City of Chicago, dealing with the review and licensing of motion pictures, is constitutional;

(2) The procedures of the Film Review Section of the Chicago Police Department and the Motion Picture Appeal Board are constitutional and proper; and

(3) The above entitled films are obscene and may not be shown in the City of Chicago.

This is an important decision in that it is the first decision of a reviewing court upholding the validity of Chapter 155 since its extensive revision in 1965.

"HELLS ANGELS ON WHEELS"

(G. M.—M. E. A.—September 13, 1967)

Your letter of September 11, 1967, relative to the movie "Hells Angels on Wheels" has been referred to this office for attention.

The picture was reviewed by members of the Motion Picture Appeals Board of the City of Chicago. Their decision was unanimous to grant a permit for this motion picture with the restriction that minors attending the film must be accompanied by an adult. Regardless of the personal taste and attitude of its

members, the Board must conform its rulings to the United States Supreme Court decisions construing the United States Constitution. The Board does refuse to award permits to many films on the ground that these films are obscene within the meaning of the law.

Mayor Daley and other city officials are most anxious to keep motion picture entertainment on a high level. We appreciate your interest in this important phase of public entertainment and hope, in the future, the decisions of the Motion Picture Appeals Board will be in keeping with your high moral standards.

OBSCENE FILMS

(L. M.—M. E. A.—November 29, 1967)

Your letter of November 20, 1967, addressed to the Motion Picture Censor Bureau, has been referred to this office for attention. You object to the licensing of the film "I A Woman" for showing in Chicago. Please be advised that the Motion Picture Appeal Board licensed this film only after the distributor made significant cuts of objectionable footage.

Although this film is disgusting in many respects, it is not obscene (in its edited version) under the rules of the United States Supreme Court. For this reason, the Motion Picture Appeal Board, an independent group of citizens appointed by the Mayor, was without authority to prohibit its showing in the City of Chicago.

During the administration of Mayor Daley, the City of Chicago has waged a continuing fight against obscenity in all media of public expression. There undoubtedly has been more obscenity prosecution by the City of Chicago than by any other municipal body. Please be assured that it is the intention of the City of Chicago to continue its war against obscenity, particularly against salacious materials which are intended for young people.

In our prosecution of obscenity, we must be guided by the rules of the United States and Illinois Supreme Courts in interpreting the Constitution. These rulings limit the extent to which the freedoms of speech and the press may be restricted in curbing seemingly objectionable books and magazines. Therefore, what may be objectionable from a moral or religious viewpoint is often not subject to legal prosecution.

In spite of the legal difficulties imposed by the courts in prosecuting obscenity, our office is continually bringing new cases before the reviewing courts and requesting that the reviewing courts re-examine their existing opinions on the subject. In this regard, we recently won a landmark decision before the Illinois Supreme Court which justifies our reviewing of motion pictures (for obscenity) as a condition to licensing them.

Your high standards and constructive attitude as reflected in your letter are most commendable. I hope that you will continue in your opposition of obscene material.

Thank you for your letter and let me assure you that Mayor Daley appreciates your interest in these important civic matters.

PANIC PEDDLING

(Associate City Attorney, Department of Law, City of Atlanta—C. J. O'C.—October 19, 1967)

Your recent letter addressed to the Corporation Counsel has been referred to the undersigned for reply. In this letter you request information pertaining to the control of panic peddling by real estate brokers.

We are enclosing herewith two booklets entitled, "Your Civil Rights" and "Rules Governing Practice and Procedure Before the Chicago Commission on Human Relations Relating to the Chicago Fair Housing Ordinance", prepared by the Chicago Commission on Human Relations. Paragraphs F and G of Section 3 of Chapter 198.7-B of the Municipal Code of the City of Chicago found on page 33 of the booklet, "Your Civil Rights" contains the anti-panic peddling provision of the Chicago Fair Housing Ordinance. We are also enclosing the opinion of the Illinois Supreme Court sustaining the constitutionality of said ordinance.

The Illinois General Assembly has granted the City of Chicago the authority to regulate real estate brokers. Pursuant to this authority, the Chicago Fair Housing Ordinance was enacted. It has been our experience that since the passage of said ordinance, the hardcore peddling described in your letter has been substantially abated. Presently we find that the majority of panic peddling complaints involve subtle sales techniques that do not expressly refer to the racial change of neighborhoods.

If you have occasion to visit Chicago, we invite you to review the trial transcripts of cases which are retained by the Law Department. If you have any further questions, we will be happy to assist you.

RESIDENTIAL PICKETING

(Village Attorney, Shorewood, Wisconsin—S. S. October 10, 1968)

Reference is made to your letter dated October 1, 1968, wherein you requested information concerning the Residential Picketing statute in Illinois.

The only experiences that the City of Chicago has had in regard to the statute have been by Chicago Police Officers and other officials who have informed picketers of the existence thereof, thereby motivating a dispersal of the persons involved. Since a violation of the statute is a state offense, there have been no City prosecutions pursuant to the statute. To our knowledge there have been no State prosecutions.

Our office is not aware of any other city in the state which has had experience in enforcing the provisions of this law.

A reading of the opinion in *City of Chicago* v. *Dick Gregory*, 39 Ill. 2d 247, 233 N.E. 2d 422 (1968), would be helpful in reference to the constitutional implications of residential picketing.

PRENATAL EXAMINATIONS ON MINORS

(Commissioner, Board of Health—F. G. S.—December 21, 1970)

Your letter of December 2, 1970 addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for attention and reply. In your letter you request an opinion as to whether it is necessary to have a parent's or guardian's signature authorizing medical care before a prenatal examination can be done on a pregnant minor, married or unmarried.

Chapter 91, Section 18.1, Illinois Revised Statutes 1969 provides the following:

> "The consent to the performance of a medical or surgical procedure by a physician licensed to practice medicine and surgery executed by a married person who is a minor, by a pregnant women who is a minor, or by any person 18 years of age or older, is not voidable because of such minority, and, for such purpose, a married person who is a minor, or any person 18 years of age or older, is deemed to have the same legal capacity to act and has the same powers and obligations as has a person of legal age."

It is our opinion, on the basis of the above cited provisions, that it is not necessary to have a parent's or guardian's signature authorizing medical care before a prenatal examination may be done on a pregnant minor, married or unmarried, provided, however, that consent to the performance of a medical or surgical procedure by a physician licensed to practice medicine and surgery is executed by the minor. A pregnant woman, married or unmarried, who is a minor has the same legal capacity to act for such purpose as a person of legal age.

REST ROOMS IN PLACES OF BUSINESS

(Alderman, 19th Ward—A. H.—February 8, 1971)

Your letters seeking an answer from the Law Department with respect to a request from one of your constituents for an opinion as to the existence of a law in Illinois requiring rest rooms to be installed in each place of business has been referred to the undersigned for consideration and response.

The authority delegated to municipalities by the General Assembly for the regulation of privies or water closets appears in Section 11-42-10 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, ch. 24, par. 11-42-10). Other indirect delegations of such authority, with respect to food establishments, for example, appear in Chapter 56½ of said statutes, particularly, Paragraphs 67 and 71.

The Municipal Code of Chicago contains requirements that toilet facilities be provided for employees in varying instances dealing particularly with food dispensing, such as in Chapter 95, Sections 95-28, 95-29.1(k); Chapter 107, Section 107-8; and Chapter 130, Sections 130-6, 130-15.17 and 130-39. In only one instance, however, is there a direct suggestion in the Municipal Code of Chicago that toilet facilities be provided for patrons as well as employees, namely, in the chapter regulating Liquor Dealers, Chapter 147, Section 147-10. Presumably, this requirement is made because of the length of time a patron may be expected to remain in the premises, as well as the nature of the product therein consumed.

From an examination and consideration of the foregoing provisions, it is our opinion that the decision with respect to whether toilet facilities shall be required in various places of business or not is primarily a legislative determination; however, any such determination producing an affirmative requirement should be made on the basis of a careful investigation as to the need thereof from the standpoint of the public health in each instance.

SANITARIAN REGISTRATION ACT

(President, Civil Service Commission—S. R. D.—September 20, 1967)

We acknowledge receipt of your recent communication requesting our opinion as to the applicability of the Sanitarian Registration Act (Ill. Rev. Stat. 1965, chap. 111½, pars. 551-572 inc.) to those City employees whose duties fall within the provisions of the Act so that they may have an opportunity to register as a Sanitarian, without examination, prior to December 31, 1967.

The scope of the Act attempts to embrace the entire field of environmental sanitation and to promote and preserve the health, safety, comfort and well-being of mankind through the licensing and regulation of sanitarians.

Section 2 of the Act defines "environmental sanitation" to mean the application of scientific and practical principles for the control of air, water, waste, food, drink, chemicals, cosmetics, drugs, shelter, undesirable biological organisms, rodents, insects, birds, other vermin and other external and internal physical conditions of man's environment to the extent and solely for the purpose that these activities promote and preserve the health, safety, comfort and well-being of mankind. The Act further defines "environmental sanitation" to include the screening, testing, devising, and evaluation of methods, materials and equipment "to accomplish the above applications."

Although the Act limits its application to "scientific and practical principles", the definition of a sanitarian is so broad that it conceivably could include a person performing duties which might only remotely be related to "environmental sanitation". Limiting the application of the definition of sanitarian to persons in City employment, the Act defines it to mean "a person whose education and

experience in the biological and sanitary sciences qualifies him to be regularly engaged wholly or in part * * * in the promotion and protection of public health, or one who applies and practices the principles of environmental sanitation to the extent and solely for the purpose that his activities directly promote the health, safety, comfort, and well-being of mankind as: a member of a governmental units; * * * a person who sells his services as a sanitation consultant, advisor or inspector; a person who is responsible for controlling environmental sanitation in any public institution, * * * or other public gathering place * * *."

Due to the many probable interpretations of the definitions of "environmental sanitation" and "sanitarian", the Act attempts to further elucidate by listing certain persons who do not qualify for registration under the Act. The listing includes a "sanitary engineer" as defined by the Act; a person employed in any of the departments, bureaus or agencies of the United States of America; a person performing the functions and duties of a sanitarian under the direction of a Sanitary Engineer or registered Sanitarian, provided the person is not responsible for the administration or supervision of one or more persons engaged in an environmental sanitation program; a person performing janitorial, maintenance, housekeeping, cleaning, laundry, or plumbing services; a person involved with other than the direct responsibility for the sanitary quality of the product throughout the food, drug or cosmetic industry; or a person performing labor type services involving food, drug or cosmetic processing.

In light of the foregoing, it is extremely difficult to determine the City employees who should register as sanitarians under the Act. The limitation of "environmental sanitation" to "the application of scientific and practical principles", the limitation of a "sanitarian" to "a person whose education and experience in the biological and sanitary sciences qualifies him to be regularly engaged * * * in the promotion and protection of public health" and the exclusion of certain listed persons from the provisions of the Act could lead to the conclusion that persons performing menial services, even though directly related to an environmental sanitation program, would be excluded from the definition of sanitarian requiring registration under the Act.

This conclusion is supported by other provisions of the Act. In order to qualify to be registered as a sanitarian after December 31, 1967 (Section 4 of the Act), one must be not less than 21 years of age, of good moral character and temperate habits, a graduate of a college or university recognized and approved by the Department, have satisfactorily completed 45 quarters or 30 semester hours of academic training in the basic physical, chemical, biological or sanitary sciences, and have been employed full time in the field of environmental sanitation under the direction of a Sanitary Engineer or registered Sanitarian for at least 3 of the 5 years preceding his application. The Act provides that the satisfactory completion of each year of sanitary science or public health study as a graduate student in the Graduate Department of an approved university, subsequent to the earning of a baccalaureate degree, shall be considered as equivalent to a year of the required experience; provided that graduate educational credit shall not be accepted in lieu of more than two years of experience.

It is apparent the ultimate purpose of the Act is that all sanitarians be college graduates majoring in the sanitary sciences with practical experience in the field of environmental sanitation for at least 3 of the 5 years preceding the filing of an application for registration as a sanitarian. Needless to say, a person with the foregoing qualifications would be, or should be, actively engaged in the research or supervision of an environmental sanitation program and not performing menial tasks.

Under the "grandfather" provisions of the Act (Section 6), a person may register as a sanitarian without an examination on or before December 31, 1967, if he is actively engaged in practice as a sanitarian on the effective date of the Act, is not less than 21 years of age, is of good moral character and temperate habits, meets the citizenship requirements as set forth in Section 4 of the Act, and either (a) is a graduate of a high school or other secondary school approved by the Department and has had at least two years of successful experience in the field of environmental sanitation prior to the effective date of the Act, or (b) has

had at least 5 years of successful experience in the field of environmental sanitation prior to the effective date of the Act.

In light of the foregoing, it is our suggestion that each department head review the duties of his personnel and, if in his opinion, there are persons in his department who come within the provisions of the Act, he should recommend that an application be filed with the Board of Registration for Sanitarians in the Department of Registration and Education of the State of Illinois, prior to December 31, 1967. Said persons could then become registered as Sanitarians, without examination, as provided in Section 6 of the Act. The filing fee of $20.00, as provided in Section 22 of the Act, should accompany each application.

It is suggested, that if there is any doubt by any present or prospective City employee as to whether he comes within the purview of the Act, he should file his application for a certificate of registration as a sanitarian before December 31, 1967, and place with the Board of Registration for Sanitarians the final determination of whether or not he is entitled to be registered as a sanitarian without an examination.

SAFE SIDEWALK ORDINANCE

(Chairman, Committee on Local Industries, Streets and Buildings—H. N. L.—November 3, 1971)

This letter is in response to your letter of August 20, 1971 requesting advice as to the proposed Wintertime Safe Sidewalk ordinance.

The preamble of the ordinance suggests that the 1970 Constitution authorizes the City of Chicago to enact an ordinance requiring abutting property owners to clear snow from their sidewalks. However, various Illinois cases which discuss the validity of ordinances requiring snow removal by abutting property owners, e.g., *Gridley* v. *City of Bloomington,* 88 Ill. 554 (1878); *City of Chicago* v. *O'Brien,* 111 Ill. 532 (1884); and *Burns* v. *Kunz,* 290 Ill. App. 278 (1937) did not indicate that any provision of the 1870 Constitution prohibited the municipalities from enacting snow clearance ordinances. These decisions hold that such ordinances are prohibited on two grounds. They are that 1) all citizens benefit equally from having clear sidewalks and 2) the abutting owners do not receive any special benefits, thus they should not be put under the burden of being required to clear snow. This rationale is equally applicable under the 1970 Constitution as it was under the 1870 Constitution.

Therefore, the new constitution does not grant the municipalities any new power to enact snow clearance ordinances.

POLITICAL SIGNS ON RESIDENTIAL PROPERTY

(J. W. H.—D. P.—November 7, 1967)

Your recent letter addressed to Mr. Raymond F. Simon, Corporation Counsel, requests citation to ordinances which concern political signs on private property in residential neighborhoods.

No ordinance of the City of Chicago restricts the right of any owner of private residential property to exhibit signs indicating support of any political party or candidate. Business and advertising signs are, of course, regulated under the zoning ordinance and illuminated signs are separately controlled under city electrical regulations. The fact that a sign is political in nature, however, is of no legal significance with respect to city regulation.

However, state law prohibits "electioneering . . . within 100 feet of any polling place . . . ." (Ill. Rev. Stat. 1965, ch. 46, par. 17-29). This provision,

by interpretation, includes political signs. Therefore, any such sign on private property within that area would be in violation of state law regardless of the character of the neighborhood—residential, commercial, or manufacturing.

Should you have any further questions in this regard, we suggest you contact the Board of Election Commissioners, Room 308, City Hall, Chicago, Illinois 60602.

SWIMMING POOL ORDINANCE

(Alderman, 9th Ward—D. P.—September 9, 1968)

Your recent letter to the Corporation Counsel requests a clarification of the provisions of the Chicago Private Residential Swimming Pool Ordinance.

That ordinance, which is found in the Municipal Code of Chicago at Chapter 61, sections 61-18 to 61-18.19, was passed in 1957 in an effort to minimize, through municipal supervision, the many safety and sanitary hazards presented by private swimming pools. It was upheld by the Supreme Court of Illinois in *Palangio* v. *City of Chicago,* 23 Ill. 2d 570 (1962).

Briefly, a two-step procedure is required for city approval of the construction or installation of any private pool with a water-depth at any point of more than two feet. First, it is necessary to be granted a special use by the Zoning Board of Appeals; second, if the special use is granted, permits must be issued by the Commissioner of Buildings and the Commissioner of Water and Sewers.

City requirements are explained in more detail in an instruction form issued by the Department of Buildings, a copy of which is enclosed for your use. Additional copies, as well as copies of the ordinance, are available from:

Mr. Alex H. Zimmerman
Assistant to the Commissioner
Department of Buildings
320 N. Clark Street,
Chicago, Illinois.

PROPOSED TAXICAB SEATBELT ORDINANCE

(Alderman, Fifth Ward—R. L. C.—March 9, 1971)

Your recent letter directs my attention to a proposed ordinance, the thrust of which appears to compel passengers riding in public passenger vehicles to affix seat belts while in taxicabs and you solicit our opinion as to its legality.

When this proposed ordinance is read in the light of the Illinois Supreme Court decision in People v. Fries, 42 Ill. 2d 446, it is obvious that the proposal is invalid. There the court states: "If it (the regulation) is directed toward the safety of the individual rather than the safety of the public, then the statute is beyond the authority of the Legislature acting under its police powers." The proposal seems also to fail the test of the equal protection clause of the 14th Amendment to the Federal Constitution in that the provision does not apply to passengers in other vehicles. The classification of passengers in public passenger vehicles as distinguished from passengers in other types of vehicles exposed to the same hazards is, in my opinion, an unreasonable classification and thereby invalid.

RECORDING OF WHOLESALE TOBACCO TRANSACTIONS

(Superintendent of Police—R. F. F.—November 24, 1970)

This is in answer to your letter of 28 October, 1970, in which you inquire as to the means available to compel wholesale tobacco dealers to comply with Section 178-6 of the Municipal Code. That section requires that wholesale tobacco dealers keep a record of their sales including information such as name and address of purchaser, retail tobacco dealer's license number, etc. Section 178-6 provides that these records shall be open at reasonable times to inspection by the Police and further, that such records shall be transmitted to the Superintendent of Police each month.

A wholesale dealer who refuses to comply with the record disclosure ordinance is subject to having his wholesale dealer's license revoked under the terms of Section 178-8 of the Code. Further, a violation of that requirement will make wholesalers subject to a $25.00 to $100.00 fine each day he refuses to comply (Section 178-24).

PAMPHLETS CONCERNING VENEREAL DISEASE

(Alderman, 46th Ward—H. N. L.—January 31, 1972)

I am writing you this letter in response to your inquiry regarding the distribution of pamphlets containing information on the prevention and treatment of venereal disease.

By distributing such pamphlets you would not be subject to criminal prosecution. Section 192-12 of the Municipal Code of Chicago could not be enforced, because of the rationale stated in *Griswold* v. *Connecticut,* 381 U.S. 479, 14 L.ed 2d 510 (1965). Therefore, there is no need to enact the proposed amendment to the Municipal Code that you enclosed with your inquiry in order to allow you to distribute the pamphlets. However, if you decide to introduce the proposed amendment, it is suggested that it be worded in the following form:

"Be It Ordained by the City Council of the City of Chicago:

Section 1. That the ordinances 192-11 and 192-12 passed by the City Council of the City of Chicago on June 23, 1965, and appearing on page 4847 of the Journal of the Proceedings of the City Council of the City of Chicago of said date be and is hereby repealed.

Section 2. This ordinance shall be in force and effect from and after its passage.

CHAPTER VI—LICENSES AND PERMITS

Section A. LIQUOR LICENSES

UNEQUAL ADMISSION CHARGES FOR MEN AND WOMEN

(Administrative Assistant to the Mayor—B. H. G.—August 21, 1969)

Your recent request to Raymond F. Simon, Corporation Counsel, for an opinion as to whether liquor licensed premises can legally charge men admission and admit women free has been forwarded to the undersigned for reply.

Chapter 43, par. 133 of the Illinois Revised Statutes 1967, reads as follows:

> "Civil rights in licensed premises.) No licensee licensed under the provisions of this Act shall deny or permit his agents and employees to deny any person the full and equal enjoyment of the accommodations, advantages, facilities and privileges of any premises in which alcoholic liquors are authorized to be sold subject only to the conditions and limitations established by law and applicable alike to all citizens."

It is therefore our opinion that the facts in the instant case are a violation of the above cited statute.

SALE OF LIQUOR AT AIRPORTS

(Administrative Assistant to the Mayor—R. N. K.—November 18, 1970)

Your recent inter-office communication addressed to Mr. Richard L. Curry, Corporation Counsel, has been referred to the undersigned for response. You request an opinion as to whether the amendment to Chapter 43, Paragraph 130 of the Illinois Revised Statutes of 1969 which went into effect July 1, 1970, requires that the sale of liquor at airports be in conjunction with food service to a customer and at a dining table and not across a bar.

Chapter 43, Paragraph 130 of the Illinois Revised Statutes provides in part:

> "No alcoholic liquors shall be sold or delivered in any building belonging to or under the control of the State or any political subdivision thereof; provided, that such liquors may be delivered to and sold at any airport belonging to or under the control of a municipality of more than 50,000 inhabitants; provided, further, that alcoholic liquors may be sold at retail in buildings of golf courses owned by municipalities or park districts, under the 'Park District Code' in connection with the operation of an established food serving facility during times when food is dispensed for consumption upon the premises, and such sales may be made only
>
> (1) with food served to the customer, and
>
> (2) at a dining table and not across a bar."

There is no requirement in the Statute that the sale of liquor at airports be in conjunction with food service to a customer and at a dining table and not across a bar. These requirements only apply in the case of golf courses owned by municipalities or park districts.

WINE AUCTION

(Administrative Assistant to the Mayor—R. N. K.—February 6, 1970)

Your recent inter-office communication addressed to Mr. Richard L. Curry, Acting Corporation Counsel, has been referred to the undersigned for response. Your communication refers to a letter and two booklets from Mr. H. V. Gorman, Jr., Assistant General Counsel of Heublein, Inc.

Mr. Gorman states that Heublein, Inc. wishes to conduct a wine auction in a Chicago hotel. Bidders would be representatives of both the liquor trade and public. Mr. Gorman desires to know what procedures Heublein, Inc. would have to follow in order to conduct such an auction.

Chapter 106, Section 106-2 of the Municipal Code of Chicago provides that no person shall sell or attempt to sell at public or private auction in this city any real or personal property of any kind whatsoever without first having a license therefor.

Section 106-8 of said Code provides that no licensed auctioneer shall sell or offer for sale at public auction, any real or personal property at or in any place, house, store, or building, other than in the place, house, store, or building designated in his license and where he is authorized to act as auctioneer, except upon a special permit therefor issued by the Mayor.

Therefore, in order for Heublein, Inc. to hold an auction in the City of Chicago it would have to hire a licensed auctioneer who has a permit to hold an auction at the hotel selected by Heublein, Inc.

Chapter 147, Section 147-2 of the Municipal Code of Chicago provides that no person shall sell at retail any alcoholic liquor without first having obtained a city retailer's license for each location, place or premises where the retailer is located to sell the same.

Section 2.21 of Article 1 of the Illinois Liquor Control Act (Chapter 47, Paragraph 95.21 of the Illinois Revised Statutes of 1967) provides in part that "sale" means any transfer, exchange or barter in any manner, or by means whatsoever, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee. Under this definition an auction would constitute a sale.

Section 2.18 of Article 1 of the Illinois Liquor Control Act provides that "sell at retail" and "sale at retail" refer to and mean sales for use or consumption and not for resale in any form.

Since the public would be participating in this auction a sale to a member of the public would be for personal consumption which would constitute a "sale at retail" as defined in the Liquor Control Act. Therefore, in order for Heublein, Inc. to conduct a wine auction in the City of Chicago in addition to hiring a licensed auctioneer it would have to acquire a City of Chicago retail liquor license.

TAVERN "CLEAR VIEW" REQUIREMENT

(Administrative Assistant to the Mayor—M. S. J.—February 3, 1969)

Your request to the Corporation Counsel for an opinion as to whether or not the above cited locations are in violation of any state law, rule or regulation of the Illinois Liquor Control Commission has been referred to the undersigned for reply.

Your file indicates that the premises at 167 E. Chicago Avenue located in the basement have no clear view from the street or sidewalk and the management does not serve food after 5:00 P. M. The location at 3 W. Tooker Place is on the 2nd floor level and has no clear view from the street. The kitchen located on the 3rd floor, available for the premises, is not in operation and no food is served on the premises.

The sections of the Liquor Control Act pertinent to the above locations are Chapter 43, paragraph 95.23 Illinois Revised Statute (1967) wherein a restaurant is defined, in substance, to be a place "where meals are actually and regularly served . . .". Chapter 43, paragraph 141, Illinois Revised Statutes (1967) prohibits the operation of a tavern without a clear view of the interior of the premises from the sidewalk and street except if the premises are operated as a restaurant, hotel, club or bowling establishment. Chapter 43, paragraph 152, Illinois Revised Statutes (1967) prohibits any person from receiving a liquor license for a location as a restaurant unless the location has the qualifications as required.

In the instant cases neither location actually and regularly serves food and, therefore, neither qualifies as a restaurant. A clear view of the interior of the premises from the sidewalk or street is necessary for each location. In the absence of the "clear view" a violation of the Liquor Control Act exists.

Neither location qualifies for a retail liquor license. If a license has been granted to either location revocation proceedings may be instituted for each.

LIQUOR LICENSES FOR CONTRACT PURCHASERS

(City Collector—A. H.—June 12, 1968)

We have your letter of June 4, 1968, addressed to Corporation Counsel Raymond F. Simon, seeking an opinion as to whether contract purchasers under contracts which do not provide for the immediate transfer of legal title to the real estate in question are eligible to apply for City Retailer's Alcoholic Liquor licenses, in view of Article VI, General Provisions, Section 2(13) (Ill. Rev. Stat. 1967, ch. 43, par. 120(13)).

The last cited section provides, in part, as follows:

"No license of any kind issued by the State Commission or any Local Commission shall be issued to:

* * *

(13) A person who does not beneficially own the premises for which a license is sought, or does not have a lease thereon for the full period for which the license is to be issued;"

No case is found directly construing the above noted provisions, nor has the phrase "beneficially own" been definitively construed in other instances; however, reference to analogous language is of assistance in arriving at an appropriate interpretation.

In *People ex rel. Hart* v. *Village of Lombard,* 319 Ill. 56, the Supreme Court considered the meaning of the word "owner" with respect to whether one need have an absolute fee or a lesser estate in order to be considered an "owner," stating (p. 59):

"When the term 'property owner' is used without restriction it includes both general and special owners. (*Hartford* v. *Brady,* 114 Mass. 466; *Hull* v. *Sangamon River Drainage District,* 219 Ill. 454; *Coombs* v. *People,* 198 id. 586; *Chiesa* v. *DesMoines,* 158 Iowa, 343.) The word 'owner' has been defined to include one who has the use, control or occupation of the land with claim of ownership, whether his interest be an absolute fee or a less estate. (*Fort Dearborn Lodge* v. *Klein,* 115 Ill. 177; *Huston* v. *Tribbetts,* 171 id. 547; *Arms* v. *Ayer,* 192 id. 601; *People* v. *Barnes.* 193 id. 620; *Coombs* v. *People, supra.*) In *Springer* v.

Kroeschell, 161 Ill. 358, certain contractors had entered into a contract for the construction of a building with the trustee, who held the legal title to the land on which it was to be built, and others entered into certain contracts for work on the building with the *cestui que trust.* In determining who were the owners, it was held that the word 'owner,' as applied in the Lien Law, includes the owner in quity as well as at law, and that the trustee was to be considered an owner as well as the *cestui que trust.*"

It thus appears that one may be considered to "own" property even though his interest may be equitable, rather than legal.

Closer to the instant situation is *Shay* v. *Penrose,* 25 Ill.2d 447, wherein the Supreme Court considered the legal interests attaching to parties to a real estate contract, under the doctrine of equitable conversion, stating (p. 449):

> "Equitable conversion is the treating of land as personalty and personalty as land under certain circumstances. Hence, as between the parties and those claiming through them, when the owner of land enters into a valid and enforceable contract for its sale he continues to hold the legal title, but in trust for the buyer; and the buyer becomes the equitable owner and holds the purchase money in trust for the seller. The conversion takes place at the time of entering into the contract. It stems from the basic equitable principle that equity regards as done that which ought to be done. The doctrine of equitable conversion has been recognized in Illinois, as it has in practically every other jurisdiction, since earliest times. *Lombard* v. *Chicago Sinai Congergation,* 64 Ill. 477; *Fuller* v. *Bradley,* 160 Ill. 51; *Lewis* v. *Shearer,* 189 Ill. 184; *Rhodes* v. *Meredith,* 260 Ill. 138; *Ward* v. *Williams,* 282 Ill. 632; *Knights* v. *Knights,* 300 Ill. 618; *Smith* v. *Smith,* 340 Ill. 34; See Pomeroy, Equity Jurisprudence, 5th ed. vol. 2 sec. 368."

The above-quoted language in *Shay* was applied to circumstances in which the interests construed by the Court arose under contracts for deeds in which the contract purchasers made monthly payments with the delivery of warranty deeds being made upon receipt of final payment, and under which the seller retained an option to forfeiture in the event the buyer failed to perform his covenants, including that of making the specified payments, a set of facts quite similar to those postulated in your letter.

From the foregoing authorities, it appears that one who has contracted to purchase property under an agreement giving him the right to possession and use of said property, and wherein legal title and deed will not be delivered or pass to him until a certain number of payments have been made can be considered to "beneficially own" said property, unless the contract by its terms clearly negates the implications of the law as set forth in the *Lombard* and *Shay* opinions from which we have quoted.

MUSIC AND DANCING LICENSES

(Administrative Assistant to the Mayor—R. N. K.—September 8, 1970)

Your recent inter-office communication addressed to Mr. Richard L. Curry, Corporation Counsel, has been referred to the undersigned for response. You request an opinion as to whether a liquor dealer is required to hold a music and dancing license when he employs a piano player but prohibits dancing.

> Chapter 147, Section 147-12 of the Municipal Code of Chicago provides: "Any person licensed under this chapter shall have the privilege, upon the payment of an additional fee of seventy-five dollars, of providing upon the licensed premises an orchestra not to exceed eight pieces and permitting dancing by patrons therein, provided, however, no entertainers other than

the members of such orchestra shall be engaged or permitted to perform therein. Such privilege shall terminate upon the termination, for any cause, of the City retail license for the sale of alcoholic liquor."

Pursuant to this provision a music and dancing license would permit a liquor dealer to provide an orchestra not to exceed eight persons, permit dancing by patrons, or both. A music and dancing license would be required if there is an orchestra and dancing is prohibited.

An individual piano player would be included in the definition of an "orchestra" as provided in Section 147-12.

Therefore, a liquor dealer would be required to hold a music and dancing license if he employs a piano player but prohibits dancing.

ISSUANCE OF LICENSE TO DE PAUL UNIVERSITY

(Deputy Mayor—M. J. D.—May 1, 1973)

Your recent letter addressed to Richard L. Curry, Corporation Counsel of the City of Chicago, requesting an Opinion as to whether De Paul University may be issued a liquor license for the sale of alcoholic liquor on its premises has been referred to the undersigned for consideration and response.

Your request indicates that De Paul University is seeking a liquor license in order that various educational organizations conducting conventions and other affairs be allowed to sell alcoholic beverages at the University Center during such affairs.

Chapter 43, Section 127, Illinois Revised Statutes (1971), states in part as follows:

"No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school . . . ."

Therefore, it is the opinion of this office that no liquor license may be issued to De Paul University.

Section 127, Illinois Revised Statutes (1971), further provides that:
"No alcoholic liquor, other than beer, shall be sold for consumption on the premises within 1500 feet from any building used for regular classroom or laboratory instructions on the main campus of any state university, owned or maintained in whole or in part by the State of Illinois . . . ."

Your request does not state whether De Paul University receives funds from the State of Illinois. If such is the case, they would then come under the restrictions imposed by Section 127.

FEE EXEMPTION FOR IIT

(City Collector—D. J. O'B.—September 11, 1969)

This is in reply to your recent letter requesting an opinion from this office as to the eligibility of the Illinois Institute of Technology, herein sometimes referred to as IIT, to obtain a fee exempt Chicago retail liquor license.

You stated IIT wishes to serve bottled beer in a snack bar on its campus and bases its claim to a fee exempt license to do so on a City of Chicago ordinance passed September 16, 1959 which reads as follows:

"SECTION 1. The Commissioner of Buildings, the Commissioner of Public Works, the Commissioner of Streets and Sanitation, the Commissioner of

Water and Sewers, the President of the Board of Health, and the City Collector are directed to issue all necessary permits and licenses, free of charge, notwithstanding other ordinances of the City of Chicago to the contrary, to Illinois Institute of Technology, an Illinois corporation not for pecuniary profit, for the erection and maintenance of educational and research buildings and other necessary buildings and fuel-storage facilities connected with the activities of Illinois Institute of Technology, an Illinois corporation not for pecuniary profit, in the area bounded by E. and W. 30th Street on the north, S. Michigan Avenue on the east, E. and W. 35th Street on the south, and the right of way of the Chicago, Rock Island & Pacific Railroad on the west.

Said buildings and all appurtenances thereto shall be used exclusively for charitable and educational purposes and shall not be leased or otherwise used with a view to profit, and the work thereon shall be done in accordance with all of the appropriate provisions of the Chicago City Code and the departmental requirements of various departments of the City of Chicago, and said buildings and all appurtenances thereto shall be constructed and maintained so that they shall comply in all respects with the requirements of the appropriate provisions of the Chicago City Code for the issuance of all permits and licenses."

An answer to your inquiry demands an analysis and interpretation of this ordinance and a determination of the legislative intent of the City Council.

The language of the ordinance in question indicates that the fee exemption provision for licenses and permits is intended to apply only to construction and maintenance of physical plant and related permits. Evidence of this is the initial enumeration of departments and department heads in the ordinance. (*i.e.*) Commissioner of Buildings, Commissioner of Public Works, Commissioner of Streets and Sanitation, Commissioner of Water and Sewers, the President of the Board of Health and the City Collector.

Other language is found in the ordinance which reinforces this interpretation.

". . . . and other necessary *buildings* and *fuel storage facilities* connected with the activities of the Illinois Institute of Technology."

"Said *buildings* and all *appurtenances* thereto shall be *constructed* and *maintained* so that they shall comply in all respects with the requirements of the appropriate provisions of the City of Chicago Code for the issuance of all permits and licenses."

"Said *buildings* and all *appurtenances* thereto shall be used exclusively for charitable and educational purposes." (Emphasis added)

A traditional rule of statutory construction referred to as 'expressio unius est exclusio alterius' is particularly applicable to an interpretation of this ordinance.

This rule states that if a statute enumerates certain subjects, it is to be construed as excluding from its effect all those not expressly mentioned.

The ordinance upon which IIT relies as quoted above specifically states that these permits and licenses are to be given free of charge for the enumerated purposes of "erection and maintenance of educational and research buildings." In applying this rule of construction it becomes clear that permits or licenses for any other purpose are not included in the coverage of the ordinance.

The privilege of selling liquor is not related, directly or indirectly, to the "erection and maintenance of educational and research buildings" and is therefore not included in the fee exemption provisions of the ordinance.

Based on the foregoing analysis of the language and legislative intent of the ordinance in question, it is the opinion of this office that a retail liquor license is not that type of license which is included or intended to be included in the fee exemption ordinance.

The Illinois Institute of Technology is therefore not entitled to a fee exempt Chicago retail liquor license for the snack bar on its campus.

FREE CHAMPAGNE FOR FIRE CHIEFS

(Administrative Assistant to the Mayor—R. N. K.—June 10, 1969)

Your recent letter addressed to the Corporation Counsel regarding a letter from Richard J. Gergel, Sales Manager—Fire Apparatus of Ward LaFrance Truck Corporation, herewith returned, has been referred to the undersigned for response. Mr. Gergel requests permission for the Ward LaFrance Truck Corporation to distribute a free glass of champagne to the fire chiefs who visit the Corporation's display at the International Association of Fire Chiefs Convention to be held at the International Amphitheater from October 19 through October 21, 1969.

Chapter 147, Section 142-2 of the Municipal Code of Chicago provides that no person shall sell at retail any alcoholic liquor without first having obtained a city retailer's license for each location, place, or premises where the retailer is located to sell the same.

Chapter 147, Section 147-1 of said code requires reference to the Illinois Liquor Control Act in order to determine what constitutes a "sale".

Section 2.21 of Article 1 of the Illinois Liquor Control Act (Chapter 47, Paragraph 95.21 of the Illinois Revised Statutes of 1967) provides in part that "sale" means any transfer, exchange or barter in any manner, or by any means whatsoever, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee.

Further, Section 1 of Article II of the Illinois Liquor Control Act (Chapter 47, Paragraph 96 of the Illinois Revised Statutes of 1967) provides that no person shall manufacture, bottle, blend, sell, barter, transport, deliver, furnish or possess any alcoholic liquor for beverage purposes, except as specifically provided in this Act. Attention should be given to the term "furnish".

There is no provision in the Illinois Liquor Control Act which would permit the Ward LaFrance Truck Corporation to furnish a free glass of Champagne as the Corporation desires.

Further, the distribution of a free glass of Champagne would be a transfer that would constitute a "sale" as defined in the Illinois Liquor Control Act, and the Ward LaFrance Truck Corporation would be required to have a city retail license in order to make such a distribution.

LIQUOR PREMISES NEAR A HOSPITAL

(Administrative Assistant to the Mayor—B. H. G.—January 8, 1970)

Your recent request to Raymond F. Simon, Corporation Counsel, for an opinion as to whether the above location would be eligible for a liquor license in view of the 100 foot limit of hospital buildings has been forwarded to the undersigned for reply.

The question presented by your communication is whether a laundry facility owned and operated by the Children's Memorial Hospital is entitled to the protection of Section 8 of Article 4 of the Illinois Liquor Control Act, which provides in part:

> "No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school or hospital. . . ."

In *Cecil B. De Loian* v. *Illinois Liquor Control Commission,* 109 Ill. App 2d 71, the court held:

> "that the statutory distance was to be measured between the property lines of a school (hospital) and of the licensed premises."

It is our opinion that the location in question—assuming it is within one hundred (100) feet of the hospital—is not entitled to obtain a retail liquor license, therefore, the application for a liquor license at 2364 N. Lincoln Avenue should be denied.

ISSUANCE OF LICENSE CONTINGENT UPON POSSESSION OF LEASE

(Administrative Assistant to the Mayor—A. H.—February 23, 1968)

Your recent request for an opinion concerning the above-described licensee, addressed to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response.

You have attached a copy of a letter from the Chairman of the Illinois Liquor Control Commission to the effect that the State has refused to issue a license to the licensee because the latter's lease expires May 1, 1968, and it does not have a lease covering the period of the State license. You advise that the City liquor license expires on April 30, 1968, and that the described lease covers the pertinent period of time as far as the City license is concerned. You ask to be advised as to what should be done in this instance.

The Illinois Liquor Control Act provides, in that part pertinent to this issue, that no license of any kind shall be issued by the State Commission or Local Liquor Control Commissioner to "a person who does not beneficially own the premises for which a license is sought, or does not have a lease thereon for the full period for which the license is to be issued" (Ill. Rev. Stat. 1967, ch. 43, par. 120(13)). From the facts stated in your communication, the subject licensee meets the foregoing qualification for a local retailer's license, but apparently fails to meet said qualification for a State retailer's license. The issue thus presented is whether the Local Liquor Control Commissioner must refuse a license, or revoke an existing local license, where the licensee is unable to secure a State license for the aforesaid reason, although it is able to meet qualifications required for a local license.

The dualism of control and of divided responsibility existing between Local Liquor Control Commissioners and the State Liquor Commission has been the subject of several cases, *e.g., Retail Liquor Dealers Ass'n* v. *Fleck,* 408 Ill. 219; and *Pliakos* v. *Illinois Liquor Control Comm'n,* 11 Ill.2d 456, affirming 12 Ill. App.2d 170, and is heightened by the existence of several statutory provisions of the Liquor Control Act which underscore said dualism and division. For example, the State Commission is empowered to issue a State license to retailers (Ill. Rev. Stat. 1967, ch. 43, par. 108), yet is prevented from issuing such a license ". . . unless the person applying for said license shall have obtained a local license for the same premises." The Act goes further by compelling the issuance of a State license upon proper application where a local license has been obtained by the licensee, subject to the State Commission's right to make further inquiry where deemed advisable (ch. 43, par. 109). Significantly, the converse (*i.e.,* that a local license must issue where a State license has been obtained) nowhere appears in the Liquor Control Act.

In the *Fleck* case, the Illinois Supreme Court observed (408 Ill. at 224):

> "It seems to us the act indicates a legislative plan vesting in the respective local commissioners the power to determine, subject to right of appeal, the qualifications of an applicant for a local retailer's license within

their territory, and to create in the Illinois Liquor Control Commission power to determine the qualifications of applicants for licenses which, by their nature, would not be confined within a given municipality, such as licenses to manufacturers, distributors or importing distributors, non-beverage users, railroads and boats."

Although the *Pliakos* decision (11 Ill.2d at 458-59) distinguishes *Fleck* with respect to revocation procedures available to the State Commission, based upon the then newly enacted 1955 amendments, it left in full force and effect the foregoing language with respect to the *issuance* of said liquor licenses.

The *raison d'etre* of such dual control and divided responsibility is explained in the Appellate Court opinion in *Pliakos* (12 Ill. App. 2d at 176):

"The Illinois Liquor Control Act obviously is the product of the stubbornly held and widely conflicting views of the advocates of local control of the liquor traffic and the advocates of state control, as the Attorney General of the State of Illinois indicated in an opinion filed by him in 1934 interpreting the Act at the time of its adoption. (Illinois Attorney General's Reports & Opinions, 1934, p. 84.) The line between the contending forces was drawn upon the demand by one side that the State Commission have discretionary power over the issuance and revocation of all licenses and the demand by the other that the State Commission have no power with respect to local licenses. Finally, by the 1955 amendments an accord was reached whereby the State Commission was required to issue a state license automatically upon the issuance of a local license and its power to revoke was limited in the manner we have before stated. As always in such a case the statute is not a model of symmetry nor is it perfect in design, but the intention is clearly expressed, and even though it leads to a system of dual control and divided responsibility, it cannot be amended by judicial interpretation."

From the foregoing authorities and statutory provisions, it is our opinion that where a license applicant seeks to obtain a State retailer's liquor license, but is unable to show possession of a lease for the premises to be licensed for the full State license period, the State is, of course, bound to deny said license under the Liquor Control Act (Ill. Rev. Stat. 1967, ch. 43, par. 120(13)); however, if said applicant is in possession of a lease for the full local license period, no basis exists for denial of a local license, or revocation of an existing license, in the absence of other facts demonstrating disqualification under the Act, and said license should remain in full force and effect.

MINORS IN TAVERNS IN THE COMPANY OF AN ADULT

(Administrative Assistant to the Mayor—A. H.—February 13, 1969)

Your recent inter-office communication addressed to Raymond F. Simon, Corporation Counsel, requesting an opinion as to whether minors are forbidden from frequenting liquor licensed premises in the company of an adult, has been referred to the undersigned for consideration and response.

You have attached a letter written by George Ulrich, Executive Secretary of the Illinois Retail Licensed Beverage Association, in which he states he was informed by several of his members of being told by representatives of the Police Department "that minors were forbidden on the premises of a liquor licensee in Chicago." The letter asserts that the question does not arise for the purpose of condoning sales to minors, but merely to be sure that the members of the Association were not violating the law when a minor is in the company of an adult.

An examination of the pertinent statutory provision with respect to the powers of municipalities (Ill. Rev. Stat. 1967, Ch. 43, Par. 110), reveals that, among other things, the City Council may:

". . . prohibit any . . . minor . . . from drawing, pouring or mixing any alcoholic liquor as an employee of any retail licensee; and . . . prohibit any minor from at any time attending any bar and from drawing, pouring or

mixing any alcoholic liquor in any licensed retail premises; and . . . establish such further regulations and restrictions upon the issuance of and operations under local licenses not inconsistent with law as the public good and convenience may require . . ."

In *Lambrecht* v. *Illinois Liquor Control Commission, et al.*, 5 Ill. App.2d 481 (Abstract Opinion), the Appellate Court upheld a City of Rock Island ordinance which prohibited minors from being on liquor licensed premises, in reliance upon the above quoted provision.

No ordinance provision is found in the Municipal Code of Chicago which is similar to the Rock Island ordinance, although a statement of public policy and morals appears in Chapter 147, Section 147-8, which suggests that the sale of alcoholic liquor be removed from the observation of and influence on minors insofar as the same is possible, and in Section 147-14, which prohibits the sale, gift or delivery of liquor to minors or their employment upon liquor licensed premises under the conditions therein set forth.

The policy thus expressed in Sections 147-8 and 147-14 echoes State policy as found in the Illinois Liquor Control Act. For example, no license may be issued for the sale at retail of any alcoholic liquor at any store or other place of business where the majority of customers are minors of school age or where the principal business transacted consists of school books, school supplies, food, lunches or drinks for such minors (Ill. Rev. Stat. 1967, Ch. 43, Par. 127a). Also, licensees are prohibited from selling, giving or delivering alcoholic liquor to persons under the age of 21 years and all other persons, after purchasing or otherwise obtaining alcoholic liquor, shall sell, give or deliver such alcoholic liquor to persons under the age of 21 years except in the performance of a religious ceremony or service (Ill. Rev. Stat. 1967, Ch. 43, Par. 131).

Notice should be taken also of House Bill No. 97, introduced on January 22, 1969, in the 76th General Assembly, which would amend the Illinois Liquor Control Act by prohibiting the presence of all persons under the age of 21 from entering liquor licensed premises.

We conclude from the foregoing case authority, statutory and ordinance provisions that, although the City of Chicago may be empowered to prohibit the presence of minors in liquor licensed establishments, no such ordinance presently exists; however, the Illinois Retail Licensed Beverage Association may well be advised that public policy of both the State and City tends to discourage, and may ultimately prohibit, the presence of minors in such establishments and suggests possibilities wherein their presence may provide the condition, if not invitation, for violation of existing laws.

NUMBER OF LICENSES REQUIRED

(Administrative Assistant to the Mayor—B. H. G.—July 19, 1967)

Your letter of July 13, 1967, addressed to the Corporation Counsel, which asks for an opinion as to the number and types of licenses required for the above-described premises, has been referred to the undersigned for reply.

Paragraph 110 of Chapter 43 of the Illinois Revised Statutes, 1965, gives jurisdiction over retail selling of alcoholic beverages to local corporate authorities, among others.

Paragraph 157 of Chapter 43 of said statutes provides that separate licenses are required for each particular premise and said licenses apply only to the premises described therein.

The Municipal Code of Chicago, in Section 147-2, provides that licenses are required for the selling or dispensing of all alcoholic liquor and further states: "where two or more such locations, places, or premises are under the same roof or one street address, a separate city retailer's license shall be obtained for each such location, place or premise; . . ."

Section 130-1 of the Municipal Code of Chicago defines retail food establishments as including any building, room, stand, enclosure, place, or establishment occupied and used as a place of business by food purveyors, among others.

Section 178-9 of the Municipal Code defines retail tobacco dealer as including persons selling or offering for sale certain designated tobacco products. Sections 130-1 and 178-9 must be read and interpreted in the light of the general license provisions found in Sections 101-3 and 101-4 of the Municipal Code, which provide that licenses will be issued for particular kinds or places of business. The word "business", as used in these sections, indicates that each separate and distinct business would require a separate license.

Your letter states that the Waveland Lounge, Inc. is operating at 3700 N. Western Avenue, in the City of Chicago. The building contains a bowling alley with dressing rooms, washrooms, a small cocktail lounge with an entrance from inside the bowling alley and a small service bar. There is presently issued one liquor license for this location. Liquor is sold by waitresses and/or bartenders from both the service bar and the small cocktail lounge. Waitresses will serve customers seated in the bowling lanes and will be supplied with the liquor from either the bar or the cocktail lounge, whichever they are closest to. Both the bartenders and the waitresses will interchange depending upon the demands for service from the cocktail area to the service bar.

The general rules which have been used by this office in determining the number of licenses necessary in any given situation are based upon a decision of the Supreme Court of Illinois, *Malkan* v. *City of Chicago*, 217 Ill. 471. Malkan was operating two taverns in the same building; one at street level and the other in the basement. There was no physical direct connection between the two establishments. The question arose whether the City had lawfully compelled Malkan to pay a second license fee in the basement. At page 481 of the opinion, the Court said:

> "In 17 American and English Encyclopedia of Law (2nd ed. p. 237), it is said: 'One license will not authorize the person or persons licensed to conduct the business in more than one place. A license is necessary for each place, in which the business is conducted.' (*State* v. *Walker*, 16 No. 241; *Commonwealth* v. *Estabrook*, 10 Pick. 293.) In *Thomas* v. *Arie*, 122 Iowa 538, the Supreme Court of Iowa said: 'The only question presented for our determination is whether a person, having paid but one tax and having but one license, may keep for sale and sell intoxicating liquors, in two different and wholly separate rooms in the same building. We are clearly of the opinion that such question must be answered in the negative.' "

Under similar circumstances in opinions dated October 28, 1959, found in Volume 24 at page 346 and November 30, 1955, found in Volume 24 at page 317 of the Opinions of the Corporation Counsel, we quoted from a prior opinion dated November 2, 1933, No. 8199, found in Volume 18, page 507, which stated in part: ". . . if a beverage dispensing tavern or parlor consisted of a store partitioned off into two rooms yet operated by one proprietor as a single unit we would regard the requirements of the law satisfied if but one license were issued."

In another prior opinion dated November 3, 1933, No. 8202, found in Volume 18 at page 508, of the Opinions of the Corporation Counsel, we stated:

> "If the stores are contiguous and fairly may be regarded as one place or premise then in our opinion one license would suffice. However, if the two stores are not immediately adjoining and connecting so as to be regarded as one place or premise in fact, then we believe two licenses would be required.
>
> "In the situation last above stated you then ask if the two stores could be closed by a door, would the situation be altered. In our opinion this fact would not be controlling but the important question of fact to be determined would be whether or not the two stores were so closely connected as to be considered in fact one establishment."

From the information set forth in the transmitted communication and from the accompanying plat, applying the aforestated rules, it appears that the licensee in question is operating one cocktail lounge and service bar connected by an interior corridor in the bowling alley.

It is our opinion that, on the basis of the facts and data furnished in your letter, a rule of reason would require us to hold that the establishment in question must be required to possess only one liquor license for the cocktail lounge and the service bar.

OUT OF STATE LIQUOR MANUFACTURER PROHIBITED FROM HOLDING LIQUOR LICENSE

(Administrative Assistant to the Mayor—R. N. K.—April 29, 1970)

Your recent inter-office communication addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for response. You request an opinion as to whether an out of state liquor manufacturer is prohibited from holding a retail liquor license in the State of Illinois.

Section 3(e) of Article VI of the Illinois Liquor Control Act (Chapter 43, paragraph 121(e) of the Illinois Revised Statutes of 1969) provides in part that any person having been licensed as a manufacturer shall be permitted to receive one retailer's license for the premises in which he actually conducts such business, permitting the sale of beer only on such premises. This Section further provides that other than a manufacturer of beer, no manufacturer or distributor or importing distributor shall be issued a retailer's license.

Section 208 of Article I of the Illinois Liquor Control Act provides that "manufacturer" means every brewer, fermenter, distiller, rectifier, wine maker, blender, processor, bottler or person who fills or refills an original package, whether for himself or for another, and others engaged in brewing, fermenting, distilling, rectifying or bottling alcoholic liquors as above defined. No distinction is made between an Illinois manufacturer or an out of state manufacturer.

Therefore, other than a manufacturer of beer, no out of state manufacturer shall be issued a retail liquor license in the State of Illinois.

LOCAL OPTION REFERENDUM

(City Clerk—R. L. C.—March 20, 1968)

In your recent letter you ask the opinion of this office as to whether a Local Option Referendum may be held to coincide with the June 11, 1968 Primary Election.

The procedure for a Referendum on the retail sale of alcoholic liquor is set forth in the Illinois Dram Shop Act (Chap. 43, Sec. 167 Ill. Rev. Stats. 1967) as follows:

> "When any legal voters of a precinct in any city, village or incorporated town of more than 200,000 inhabitants . . . . desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in the precinct, they shall, at least sixty days before an election, file in the office of the Clerk of such city, ... a petition directed to the Clerk containing the signatures of not less than 25% of the legal voters registered with the Board of Election Commissioners . . . . from the precinct."

The definition section of the Local Referendum Article (Chap. 43, Sec. 166 Ill. Rev. Stats. 1967) defines "Elections" as follows:

> " 'Election' as used in reference to cities, villages or incorporated towns, means an election at a time fixed by law for choosing city, village or

incorporated town officers. 'Election' also means an election at a time fixed by law for choosing county, township or road district officers."

Inasmuch as the June 11, 1968 Primary Election does not qualify as an "Election" within the specific provisions of the Dram Shop Act and inasmuch as there is no election within the next six months which does so qualify, it would be inappropriate for your office to accept the filing of petitions for a Local Option Referendum.

REFERENDUM—LIQUOR LICENSES IN PRECINCT

(Alderman—5th Ward—A. H.—February 28, 1969)

We are in receipt of your recent communications concerning a local referendum held in the 57th Precinct of the 5th Ward, resulting in the granting of a liquor license for the premises at 1323 E. 63rd Street within said precinct. Your initial communication, under date of January 24, 1969, sets forth your understanding of the procedures wherein the liquor license was issued, stating, among other things, "virtually in secret, the licensee arranged for a referendum." You also stated that upon checking the records at the Board of Election Commissioners you found a proposition actually having been placed on the ballot, supported by the formal, legal advertisement. ". . . which received an overwhelming majority of votes *for* continuation of the prohibition which has been in effect for many, many years." You set forth in your letter the following language, which you understood to have been submitted to the voters:

> "Shall the prohibition of the sale at retail of alcoholic liquor (other than alcoholic liquor containing more than 4% alcohol by weight in the original package and not for consumption on the premises) be continued in the 57th precinct of the 5th Ward of Chicago?"

You state that the voters decided to continue the prohibition; however, in your letter of January 28, 1969, you correct this impression, stating that the voters voted 188 to 84 to discontinue the prohibition, although you state that the prohibition they voted on was not the one then in effect.

You advise, in your letter of January 24, 1969, that the licensee asked you a year ago how the community would feel about a local option referendum to permit the sale of liquor and that you informed him the community would be overwhelmingly opposed and you state that the licensee went to see the Reverend Mr. Brazier of TWO. ". . . who told him the same thing, I am sure." You suggest that the referendum was carried out with the use of ". . . utmost factual secrecy, [the licensee having] succeeded in having the election conducted in a reduced precinct, with a truncated proposition, and has now improperly obtain [sic.] a liquor license."

You ask that this office assist the community by bringing proceedings for the revocation of the liquor license at 1323 East 63rd Street, reporting the outrage of residents, the congregation of alcoholics, the accumulation of broken glass, the threat to school children, and the deterioration in the neighborhood, together with the imminent revival of the "Baby Skid Row" recently abolished at enormous community and City effort.

Herewith enclosed are the following documents, to which we will have occasion to refer in the course of this letter:

1. A copy of the 5th Ward map on file with the Board of Election Commissioners, showing the boundaries of precincts therein contained as of December 15, 1932.

2. A copy of the 6th Ward map on file with the Board of Election Commissioners, showing the boundaries of precincts therein contained as of July 1, 1932.

3. A copy of the 5th Ward map on file with the Board of Election Commissioners, showing the present boundaries of the precincts contained in the 5th Ward.

4. A copy of the publication and legal notice appearing in Chicago's American Friday, October 4, 1968, together with the certification of said publication, which contains notice of the local referendum to be held in the 57th Precinct of the 5th Ward on November 5, 1968.

5. A copy of a sample ballot actually submitted to the voters of the 57th Precinct of the 5th Ward on November 5, 1968.

6. A copy of the official result of the canvass of the alcoholic liquor proposition submitted to the voters on November 5, 1968, in the 57th Precinct of the 5th Ward.

7. A copy of a letter addressed to Raymond F. Simon from the licensee at 1323 East 63rd Street, Lafel Rexall Drug Co., dated February 3, 1969.

From the documents above listed, it appears that the present licensed address, 1323 East 63rd Street, located at the south side of 63rd Street, was contained within the 47th Precinct of the 6th Ward in July of 1932. The records of the Board of Election Commissioners reveal that the electors of this precinct, on November 8, 1938, voted to prohibit the sale at retail of alcoholic liquor. An examination of the 5th Ward map in 1932 reveals that the 57th Precinct thereof was situated with its southeren boundery coincident to the north side of 63rd Street, between Kenwood Avenue on the east and Kimbark Avenue on the west. The geographic area of the old 47th Precinct of the 6th Ward is now within the 57th Precinct of the 5th Ward, as of September 28, 1961, the major adjustments in ward and precinct boundaries having been accomplished at that time.

It is accurate to say that the existing 57th Precinct does not correspond precisely in its boundaries to the old 47th Precinct of the 6th Ward, in which the prohibition against the sale at retail of alcoholic liquor was first voted, nevertheless it is to be noted, first, that the licensed premises are within the geographical boundaries of each of the aforesaid precincts and, second, that the one-half block formerly contained within the old 47th Precinct, from the Illinois Central Railroad tracks east to Blackstone Avenue along the south side of 63rd Street is now part of the 29th Precinct of the 5th Ward, whereas the present 57th Precinct extends one-half block westward to a point between Kenwood and Kimbark Avenues as compared to the old 47th Precinct boundaries. The present 57th Precinct also extends one block further south than the old 47th Precinct, from 64th Street to 65th Street on either side of Dorchester Avenue, thereby encompassing a larger geographical local governmental political subdivision or precinct than the one in which the original proposition was voted.

Under the foregoing circumstances, it does not appear that the term "reduced precinct" aptly fits the situation. Moreover, the statutory authority under which this proposition was voted contemplates within its terms that the geographical lines may have changed between the time of the original proposition and the time at which the continuation proposition is submitted (Ill. Rev. Stat. 1967, Ch. 43, Par. 174).

Examination also reveals, as your letter notes, that proper publication in a newspaper of general circulation in the City of Chicago was made of the impending proposition, which, according to the publication, reveals the language to have been:

> "Shall the Prohibition of the sale at Retail of Alcoholic Liquor containing more than four per cent (4%) Alcohol by weight in the original package and not for consumption on the premises be continued in the 57th Precinct of the 5th Ward of the City of Chicago, Illinois?"

The sample ballot, containing the proposition actually submitted to the voters to which we have referred, reveals the identical language as contained in the public notice. Please note the difference in the quoted language set forth above and that contained in your letter, which should somewhat clarify the misunderstanding therein contained.

According to the official canvass, the proposition to continue the prohibition of the sale at retail of alcoholic liquor containing more than 4% alcohol by weight in the original package and not for consumption on the premises was defeated, 188 to 84. You correctly state that this is not the same proposition originally voted by the voters of the 47th Precinct of the 6th Ward in 1938. However, the Illinois Control Act does not require that an entire prohibition be removed and, by its inclusion of alternatives, in fact provides that less than the total prohibition may be removed (see, *i.e.*, Ill. Rev. Stat. 1967, Ch. 43, Par. 174).

We now turn to the issue of secrecy and the community opposition. As you note in your letter of January 24, 1969, a formal publication notifying the voters of the 57th Precinct of the 5th Ward of the submission of the instant proposition was made, as shown in the publication herewith enclosed. In addition thereto, the letter written by the licensee of the premises in question asserts some rather extensive community inquiry and apparent tentative community approval, which appears to support the ultimate result obtained with respect to the proposition. The letter suggests the concurrence of the Civil Rights and Steering Committees of TWO in the sale of packaged liquor in the 57th Precinct, as well as the Woodlawn Businessmen's Association.

We find no illegality with respect to the referendum election and issuance of the license herein involved. Notwithstanding the foregoing, it is suggested that a careful surveillance over the activities of this licensed establishment be maintained, as in all other liquor licensed establishments, by reason of the nature of said business and that any and all infractions of the law be reported to the local police precinct so that appropriate action may be taken to ameliorate any situation violative of the liquor control laws.

CLOSING OF TAVERNS FOR SPECIAL ELECTION

(Administrative Assistant to the Mayor—D. J. O'B—June 24, 1970)

In your memorandum dated June 22, 1970 you requested our opinion as to whether the sale or dispensing of liquor is permissible during the hours which polls will be open in the special election concerning the Transit District on June 30, 1970.

Section 17-27 of the Illinois Election Code, (Ill. Rev. Stat. 1969, Ch. 46, Par. 17-27) states as follows:

> "No intoxicating liquor shall be sold at retail or given away, or shall any saloon or barroom or place which such liquor is sold or given away be open on the day of any national, state, county or municipal election, including primary elections, during the hours the polls are open within the municipal area in which such election is being held."

Section 1-3 (5) of the Illinois Election Code, (Ill. Rev. Stat. 1969, Ch. 46, Par. 1-3 (5) defines "Municipal election" as follows:

> " 'Municipal election' means an election or primary, *either regular or special,* in cities, villages, incorporated towns, townships, park districts, school townships and school districts, sanitary districts, and in all other political and governmental subdivisions whose territorial limits are less than a county, irrespective of whether such election is held at the same time and place and by the same election officers as a general election; *and 'municipality' means any such political or governmental subdivision.*" (Emphasis supplied)

The Transportation District Election to be held on June 30, 1970 is a special election which has been called by Judge Harry Comerford pursuant to the Urban Transportation District Act (Ill. Rev. Stat. 1969, Ch. 111⅔, Par. 505) which sets forth the manner in which the election should be called, the manner in which it should be conducted, and the procedures for a subsequent canvass and tally of votes.

Although there is no regulation of the sale of liquor on such an election day contained in the Urban Transportation District Act, the election of June 30, 1970 is that type of special election which appears to be included in the definition of "municipal election" as stated in the Illinois Election Code and is therefore regulated by the provisions of that code.

It is, therefore, the opinion of this office that the Election Code prohibition of the sale or dispensing of intoxicating liquor on an election day while the polls are open is applicable to the Transportation District Election to be held on June 30, 1970, and that all such sales or dispensing should be prohibited on that day, in said district.

REFERENDUM TO PROHIBIT TAVERNS

(Alderman, 16th Ward—R. N. K.—February 17, 1970)

Your recent letter addressed to Richard L. Curry, Acting Corporation Counsel, has been referred to the undersigned for response. You request an opinion as to whether there can be a local referendum in a precinct in the City of Chicago which would prohibit traverns but at the same time allow a store to sell packaged liquor which is not consumed on the premises. You also inquire as to whether such a referendum has ever been presented in the City of Chicago.

Section 2 of Article IX of the Illinois Liquor Control Act (Ill. Rev. Stat. 1969, ch. 43, par. 167) provides, among other possible alternatives, for a referendum to prohibit the sale at retail of alcoholic liquor containing more than 4% of alcohol by weight except in the original package and not for consumption on the premises. If such a referendum was passed in a precinct, while taverns would be prohibited, a store would be permitted to sell packaged liquor which is not consumed on the premises.

In November, 1968, a referendum of this nature was passed in the 73rd Precinct of the 8th Ward.

SALE BY PRIVATE CLUB IN "DRY" PRECINCT

(Alderman, 18th Ward—R. N. K.—January 4, 1971)

Your recent letter addressed to Mr. Richard L. Curry, Corporation Counsel, has been referred to the undersigned for response. You state that the 32nd Precinct of the 18th Ward was voted dry at the election of November 3, 1970. You request an opinion as to whether the Donald-Eddy-Floss Post of the American Legion located in said Precinct may continue to sell liquor pursuant to their license as a private club.

Chapter 43, Paragraph 176 of the Illinois Revised Statutes of 1969 provides in part that it is unlawful to sell alcoholic liquor at retail within the limits of any political subdivision or precinct while the prohibition against such sales is in effect. This Section shall not prohibit the issuance of and operation under a manufacturer's or distributor's license in accordance with law.

Paragraph 95.18 of said Chapter provides that "sell at retail" refers to and means sales for use or consumption and not for resale in any form.

Paragraph 95.21 of said Chapter provides in part that "sale" means any transfer, exchange, or barter in any manner, or by any means whatsoever and means all sales made by any person, whether principal, proprietor, agent, servant or employee.

There is no provision in Paragraph 176 of the Illinois Revised Statutes excluding a private club from the prohibition of selling alcoholic liquor. Therefore, since the sale of alcoholic liquor by the American Legion Post located in the 32nd Precinct of the 18th Ward would be a sale at retail, said sale is prohibited as a result of the election of November 3, 1970.

REFUND OF LICENSE FEE

(D. B.—F. V. K.—February 5, 1969)

Your recent correspondence addressed to Mayor Richard J. Daley, has been referred to the Law Department, and to the undersigned, for response. Your letter is concerned with the local option election held on November 5, 1968, in the 26th precinct of the 8th ward, in which your business is located. You request information as to the results of that election, the date the eiection became effective, a possible refund of the license fee paid for the current period, and the effects that result will have on the liquor privileges in your establishment, the South Shore Ballroom.

On November 5, 1968, the voters of the 26th precinct of the 8th ward were asked to vote on the following proposition:

> "Shall the sale at retail of alcoholic liquor containing more than 4% of alcohol by weight except in the original package and not for consumption on the premises be prohibited in this 26th precinct of the Eighth Ward of the City of Chicago?"

The final result of the vote on the above propositions was in favor of the proposition, 217 "yes" votes to 140 "no" votes. Chapter 43, paragraph 168 of the Illinois Revised Statutes (1967), in referring to a referendum such as we have had, provides that the result of a local option election becomes effective thirty days after the election, or, in this case, on December 5, 1968. On December 12, 1968, notification of the election results was made to the South Shore Ballroom by notifying one Joseph C. Bridges.

The city liquor license fee of $465.00 paid for the license to commence November 1, 1968 is partially refundable. Chapter 43, paragraph 181 of the Illinois Revised Statutes (1967) provides:

> "Any portion of a license fee which shall have been paid and which represents the unexpired period for which the license was issued after the sale at retail of alcoholic liquor has been prohibited in a political subdivision or precinct in which the premises described in such license is located shall be refunded."

Therefore, you can apply to the City Collector's office for a partial refund.

By the terms of the proposition voted upon, the South Shore Ballroom can no longer sell at retail alcoholic liquor containing more than 4% of alcohol by weight except in the original package and not for consumption on the premises, including wine and beer.

With respect to your question as to whether or not club members can bring their own liquor into the club and drink it on the premises, this issue raises many legal problems which may be resolved only upon a careful scrutiny and analysis of the factual circumstances that would be presented. You should contact your own attorney who could advise you more specifically in this regard.

GROUNDS FOR REVOCATION

(Mayor of the City of Chicago—H. C. G.—July 31, 1967)

On July 28, 1967, the Appellate Court of Illinois, First District, reversed the judgment of the Circuit Court of Cook County in *Delaware Drug Co.* v. *Daley.*

The Circuit Court had set aside the order of the Local Liquor Commission (sustained by the License Appeal Commission) which had revoked the retail liquor license of the above named licensees.

The license revocation in this case presented a unique set of facts. The licensees conducted a combination of businesses, to-wit: a joint pharmacy, liquor store and miscellaneous sundries all available in the same premises. The license revocation was predicated on a finding that the licensees, through their agent-pharmacist, had sold barbiturates, amphetamine and hypodermic needles contrary to the provisions of the Statutes of Illinois.

The Appellate Court held that the finding of the Local Liquor Commissioner was correct.

The case applies the rule that other than the actual violations tied directly with the sale of liquor are grounds to revoke retail liquor licenses.

REVOCATION PROCEDURE

(City Council—H. N. N.—April 7, 1969)

On March 27, 1969, the Supreme Court of Illinois rendered an opinion reversing two judgments of the Circuit Court of Cook County which have affirmed the decision of the Local Liquor Control Commissioner of the City of Chicago and the License Appeal Commission of the City of Chicago revoking plaintiff's local liquor license and denying plaintiff's petition for a writ of Mandamus to compel return of plaintiff's music and dance, food and tobacco license revoked by the Mayor of the City of Chicago.

At issue on appeal was the nature of two provisions of the Illinois Liquor Control Act (Ill. Rev. Stat. 1967, ch. 43, secs. 94-194). It was first contended that the provisions of Section 149 of the Act violated the provisions of the Illinois Constitution prohibiting special legislation (Article VI, sec. 22) in that licenses holding a local liquor license issued for premises located in communities having a population of 500,000 or over are not permitted to remain open pending determination by the License Appeal Commission of the City of Chicago, while licensees holding license in smaller communities are permitted to remain open pending a final decision by the Illinois Liquor Control Commission. Plaintic further stated that the provision of the Act requiring the License Appeal Commission to render its decision within 20 days of the filing of an appeal (Ill. Rev. Stat. 1967, ch. 43, sec. 153), was mandatory in nature and the Commission lost jurisdiction after this period had passed.

In dealing with the first point, the Court stated sanctions must be based upon misconduct, not population, and that similar misconduct cannot be attended by different consequences. The Court held that portion of Section 149 setting different procedures for licensees based upon population to be arbitrary and, therefore, unconstitutional (Opinion pp. 3-4). Having held this portion of Section 149 to be invalid, the Court stated that the law in existence prior to its enactment will now govern, and as a result licensees must now be permitted to remain open for business pending a final determination by the License Appeal Commission.

The Court further held the 20 day time period set forth in Section 153 to be mandatory in nature and, therefore, held the order of the License Appeal Commission, affirming the revocation order rendered 28 days after filing of the Notice of Appeal to be invalid (Opinion pp. 4-5). In as much as revocation of plaintiff's other licenses was predicated upon revocation of plaintiff's liquor license, having held revocation of the liquor license invalid, the Court ordered the return of plaintiff's other municipal licenses.

EMERGENCY CLOSING

(Administrative Assistant to the Mayor—F. V. K.—January 7, 1970)

Your inter-office communication, herewith returned, directed to Richard L. Curry, Acting Corporation Counsel, has been directed to the undersigned for response. You request an opinion as to whether sufficient circumstances exist to warrant an emergency closing of the liquor licensed premises located at 5739 W. Grand Avenue.

On January 2, 1970, the reporting officers, after receiving information of prostitution on weekends at the above mentioned premises, proceeded to the above location. Upon arriving at the subject premises the reporting officers seated themselves at the bar and ordered drinks. One of the officers was approached by the bartender, one Clay Cluche, and was told in substance by Mr. Cluche that he would get the officer a woman who would engage in an act of sexual intercourse with him. About 15 minutes later a woman, later identified as one Joan Miller, entered the subject premises. Mr. Cluche notified the officer that this was the woman he had referred to earlier. He further told the officer, "You will have to take care of her and me." Mr. Cluche then brought the woman over to the officer and arrangements were made with the woman to engage with him in an act of sexual intercourse in the rear room of the tavern for $15.00 plus $5.00 for the room. When the woman and the officer went into the rear room, he placed her under arrest and charged her with soliciting for prostitution. The bartender Mr. Cluche was placed under arrest and charged with keeper of a house of prostitution and soliciting for a prostitute.

Chapter 43 paragraph 149 of the Illinois Revised Statutes (1967) provides in part.

> "If the local liquor control commissioner has reason to believe that any continued operation of a particular premises will immediately threaten the welfare of the community he may, upon the issuance of a written order stating the reason for such conclusion and without motion or hearing order the licensed premises closed for not more than 7 days . . . ."

The police report discloses one act of soliciting for a prostitute and one act of soliciting for prostitution. One such incident as this certainly does not endanger the welfare of the community.

Therefore, it does not appear that sufficient grounds exist upon which to base an emergency closing of the subject premises.

There are however, sufficient circumstances present here upon which to revoke the license of the subject premises through the normal channels provided for in the Liquor Control Act. Revocation proceedings of that type should be commenced against the subject premises.

REVOCATION REVERSED

(City Council—M. J. H.—January 23, 1968)

On January 22, 1968, the Appellate Court of Illinois, First District, affirmed the judgment of the Circuit Court of Cook County and held that the revocation of the defendant's liquor license was not justified by the evidence.

On April 9, 1964, the Mayor, after a hearing, revoked the defendant's liquor license on the ground that, on September 4, 1964, Susan Thaxton, the licensee's wife and barmaid, assaulted a patron on the licensed premises with a deadly weapon, in violation of the statutes of the State of Illinois and the ordinances of

the City of Chicago. The License Appeal Commission reversed the Mayor's revocation. In an Administrative Review action, the Circuit Court of Cook County affirmed the License Appeal Commission. The Mayor appealed to the Appellate Court.

The Appellate Court held that the evidence did not sustain the revocation on the charges specified because there was no proof that Mr. Thaxton wilfully assaulted the patron.

SALE OF ALCOHOL IN CHICAGO THEATRE

(Administrative Assistant To The Mayor—M. J. D.—September 20, 1971)

We have your letter of September 7, 1971 in which you state that Joseph Borenstein is contemplating leasing the Chicago Theatre for the use of live vaudeville type performances and inquires as to the legality of acquiring liquor licenses for the subject premises. Chapter 147, Section 147-9 of the Municipal Code of Chicago provides as follows:

> "No person licensed under this chapter shall sell, give away or permit to be sold or given away alcoholic liquor for consumption on the premises of such licensee unless the principal business of such licensee conducted on such premises is the sale at retail of alcoholic liquor or that of a hotel offering restaurant service, or of a regularly organized club, or a licensed bowling alley, or unless such person operates on said premises a restaurant within the meaning of that term as defined in an act entitled 'An Act relating to alcoholic liquors,' approved January 31, 1934, as amended, and is fully licensed as a food dispenser."

You will note that the aforementioned section requires that the principal business of the retail licensee be the sale at retail of alcoholic liquor. The only exceptions to the above requirement are a hotel offering restaurant service, a regularly organized club, a licensed bowling alley, or a restaurant. There is no exception set forth in Section 147-9 relating to the sale of alcoholic beverages in a theatre.

It is our opinion that the use of the subject premises does not conform with Chapter 147, Section 147-9 of the Municipal Code of Chicago and therefore, does not qualify for a retail liquor license.

PRESENCE OF WOMEN

(J. R.—L. H. G.—October 20, 1967)

Your letter of October 11, 1967 has been directed to this department for answer. You ask "is there an ordinance pertaining to the presence of women in any licensed premise where alcoholic liquor is sold for consumption on said premises".

We call your attention to Section 147-15 of the Municipal Code, entitled "Liquor Dealers"; said section is as follows:

> "147-15. It shall be unlawful for any licensee, his manager, or other person in charge of any licensed premises where alcoholic liquor is sold or offered for sale for consumption thereon to engage, employ or permit the engagement or employment of any female person other than the licensee or the mother, daughter, wife or sister of the licensee to draw, pour or mix any alcoholic liquor, nor shall any other female be permitted to remain on said premises, who shall solicit any patron or customer thereof to purchase alcoholic or

non-alcoholic liquor for her, himself, or any other person therein; nor shall any female, or any male representing himself to be female or impersonating a female, whether employee, entertainer, or otherwise, solicit any patron or customer therein to purchase alcoholic or non-alcoholic liquor for herself or himself or any other person therein; provided, however, that nothing herein contained shall prohibit any adult manageress or waitress who shall be regularly employed therein from accepting and serving the order of a patron or customer in the regular course of her employment as such manageress or waitress."

EMPLOYMENT OF HALF-SISTER AS BARTENDER

(Superintendant of Police—Director Vice Control Division—A. H.—January 27, 1969)

Your recent correspondence concerning whether the employment of a half-sister as a bartender falls within the purview of permissive employment of females in liquor licensed establishments has been referred to the undersigned.

You note that the problem arises following the arrest of an individual claiming to be the half-sister of the licensee, in that both persons were born of the same mother but had different fathers.

Chapter 147, Section 147-15 of the Municipal Code of Chicago, makes no reference to the inclusion of half-sisters among those female persons who may be employed to draw, pour or mix alcoholic liquor, *i.e.*, "barmaids." No case is found directly in point of the question raised; however, it is our view that half-sisters should be considered as coming within the ambit of Section 147-15, for the reasons which follow.

Section 147-15 was upheld in the face of a challenge with respect to its validity and constitutionality in *Henson* v. *City of Chicago*, 415 Ill. 564, wherein the Illinois Supreme Court considered the probable policy of the City Council in having permitted the employment as barmaids of mothers, daughters, wives or sisters, stating, in part (p. 573):

> "The council may have deemed it necessary to have a male or a female relative control and be responsible for the supply of liquor, since it is the improper dispensing thereof which tends to lead to the lowering "of moral standards, . . . Licensees, whether male or female, would have a special interest in obtaining the help of their family in the conduct of the business, and would enjoy a control over their own families conducive to good morale. . . . . They would naturally exercise careful supervision over the members of their family responsible for the liquor supply. It is highly unlikely that members of the family would so conduct themselves as to jeopardize the family investment."

It would appear that the same policy would have equal application to sisters who enjoy common parentage of one or of both parents.

Further, common usage appears to consider sisters in the same light, whether having the same parents or merely one parent in common. In *Williams* v. *McKeene*, 193 Ill. App. 615, a case dealing with the administration of an estate, the Appellate Court, approving a dictionary definition, stated (p. 617):

> ". . . [A] 'sister,' in so far as the term relates to a human being, is defined by Webster in his dictionary to be, 'a female person considered in the relation to another person . . . having the same parents (whole sister) or one parent (half sister)."

In 80 C.J.S. *Sister,* the following definition appears (p. 1310):

> "The popular and ordinary meaning of the word 'sister' is well-settled and definite, and the term is defined as meaning a female born of the same parents; a female whose parents are the same as those of another person; *a woman who has the same father and mother with another, or one of them only;* a female person considered in her relation to another person having the same parents, *or one parent in common.*
>
> "If both parents are the same the woman is simply called 'sister,' or 'whole sister;' if but one parent is the same she is called 'half sister.'
>
> *"Thus the word 'sister' embraces a sister of the half blood as well as of the whole blood."* (Emphasis supplied.)

In Black's Law Dictionary, Fourth Edition, the term sister is defined as follows:

> "Sister. A woman who has the same father and mother with another, *or has one of them only.* In the first case, she is called sister, simply; in the second, half-sister." (Emphasis supplied.)

From the foregoing authorities, it is our opinion that the term sister as set forth in Section 147-15 herein under review includes both whole and half sisters, from the standpoint of policy as well as common understanding and usage.

You also ask to be advised with respect to what information should be contained in any affidavit, oath or affirmation as would satisfy the quality of proof necessary to substantiate such a relationship for the purposes of Section 147-15. No particular form need necessarily be followed; however, sufficient information in affidavit form, properly notarized, upon oath, should be provided so as to form the basis upon which an investigation by the Police Department could prove or contradict the claim being made, *e.g.,* complete name; names of both parents; and month, day, year and place of birth. Also, such supporting documentary material should be submitted as may be reasonably available, *e.g.,* birth certificate, baptismal record, school records, marriage certificates and such other data as ordinarily would import verity.

Section B. STATE, PUBLIC VEHICLE AND DRIVER'S LICENSES

AMBULANCE LICENSE REVOCATION

(Public Vehicle License Commissioner—S. R. D.—October 9, 1967)

We acknowledge receipt of your communication requesting certain amendments to the Ambulance Ordinance (Municipal Code of Chicago, chap. 103).

In studying the ordinance, preparatory to suggesting certain amendments in accordance with your request, we noted that Section 103-14, which deals with the suspension and revocation of any license issued under the Ambulance Ordinance, contains no provision for a hearing prior to the suspension and revocation.

It is our opinion that the suspension or revocation of a license, without a hearing and an opportunity for the licensee to be heard and to be represented by counsel of his own choosing, would be contrary to the due process clauses of the United States Constitution (Amendment V) and the Constitution of the State of Illinois (Article II, Section 2).

On July 13, 1967, in a telephone conversation with you relative to the matter, you stated that you would consider the advisability of providing for a hearing, before suspending or revoking a license.

AMBULANCE DRIVERS LICENSE—FELONY CONVICTION

(City Council—H. C. G.—January 27, 1970)

On January 23, 1970, the Appellate Court of Illinois, First District, filed an opinion in *Roth* v. *Daley* which affirmed in part, reversed in part and remanded with directions the judgment of the trial in the above-captioned case. An explanation of the case follows.

The plaintiff, Roth, was an ambulance attendant-driver since 1955, and since 1961 operated his own ambulance service. In 1967 ordinances were enacted and became effective (Ch. 103 Municipal Code of Chicago, par. 103-12, 103-13) which provided, in substance that an ambulance driver required a license and that applications for these licenses were subject to the provisions of the ordinances applicable to a public chauffer (Ch. 28 Municipal Code of Chicago, pars. 1-3, 1-4, 1-6, which provided, in substance as follows:

The application had to contain information as to applicants character, reputation etc. deemed revelant by the commissioner;

The applicant had to be literate, sound physically and not addicted to drugs or intoxicants;

A license shall not be issued to a person convicted of a felony or criminal offense within eight years prior to the application (except for specified grounds) and no license shall be issued after a conviction of a crime involving use of a deadly weapon, traffic in narcotic drugs, crime against nature, incest or rape;

Applicants reputation and character must be investigated;

Applicant's knowledge of the geography of the city and knowledge of traffic laws shall be examined by the commissioner.

Prior to the 1967 amendment to Chapter 103 the only requirement for an ambulance attendant-driver was a certificate issued by the Board of Health. The plaintiff had such a certificate.

The application showed that in 1950 the plaintiff had been convicted and sentenced for armed robbery. The commissioner denied a license because of the express prohibition of the ordinance.

The plaintiff filed a complaint for a declaratory judgment and a writ of mandamus. The Circuit Court held the prohibitions in the ordinance void as applied to the plaintiff, it issued a mandamus to issue a license to the plaintiff and enjoined the City and its agents from interfering with plaintiff.

The Appellate Court affirmed the judgment of the Circuit Court that the ordinance was invalid as to the plaintiff. It further held that the trial court erred in issuing a writ of mandamus ordering a license to issue and remanded with instructions to issue a writ ordering the commissioner to examine the physical and other qualifications of the plaintiff and then act on the question of the issuance of the license.

ISSUANCE OF CHAUFFEUR'S LICENSE TO RESIDENT ALIEN

(Public Vehicle License Commissioner—B. E. N.—June 7, 1972)

The above captioned cause of action has been assigned to the General Counsel Division for preparation and defense. After a thorough analysis, our evaluation of the case is that the question before the Court is the enforcement of Section 28.1-3 of the Municipal Code of Chicago which requires that applicants for a public vehicle chauffeur's license be citizens or "declarants of citizenship".

The lawsuit is filed by the plaintiff, a citizen of El Salvador; a resident alien of the United States lawfully admitted for permanent residency pursuant to a United States Code 1101 [a] [20] in 1968, and properly registered with the United States Immigration Authority. He has been a resident of the City of Chicago since 1968 with the exception of April, 1969 to April, 1971 when he served in the Armed Forces of the United States. Plaintiff was honorably discharged from the United States Armed Forces on or about April 14, 1971.

The plaintiff applied for a Chicago Public Chauffeur's License at your office on April 3, 1972, and although he meets all the requirements for the issuance of such a license, he was refused said license because he was not a United States citizen nor a declarant of United States citizenship. The question as to whether or not that provision is enforcible is questionable.

Since at least 1886 it has been settled that, as the United States Supreme Court then said in *Yick Wo* vs. *Hopkins,* 118 U.S. 356, at 369:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."

In *Truax* vs. *Raich,* 239 U.S. 33 (1915), the Fourteenth Amendment was held to protect the right of aliens, lawfully resident in the United States, to earn a livelihood. Since the right to work for a living in the common occupations of the community is of the essence of that personal freedom and opportunity which it is the purpose of the Fourteenth Amendment to protect, the Court concluded that the States could not discriminate against aliens with respect to ordinary employment. Truax also indicated that the power to control immigration is vested solely in the federal government and deprivation by a State of an alien's right to earn a livelihood constitutes an unlawful intrusion by the State into a domain preempted by federal regulation.

A few months ago, the United States District Court in New York City applied these principles to declare invalid a New York State Law which required applicants for competitive civil service examinations to be United States citizens.

Dougall vs. *Sugarman,* 40 L.W. 2304 (Nov. 9, 1971). The Court remarked:

> "[D]efendants would be hard pressed to demonstrate that a permanent resident alien who had resided in New York or the surrounding area for a number of years, as have plaintiffs, and whose family also resides here, would be a poorer risk for a career position in New York City (vis-a-vis in the United States) than an American citizen who, prior to his employment with the state, had been residing in another state."

In conclusion, the Court held that denying aliens access to civil service status is invidious discrimination in violation of the Fourteenth Amendment.

There is no reasonable relationship between driving a taxicab and the status of citizenship. Naturalization confers no additional driving skills. Nor does it make the driver less negligent or render him more sober, honest and responsible.

Therefore, it is our opinion that the requirement of Section 28.1-3 of the Municipal Code of Chicago that applicants for public chauffeur's licenses be citizens or declarants of citizenship be not enforced, and if the applicant meets all other provisions for licensing, then such a license should be granted.

CHAUFFEUR'S LICENSE—CONVICTED FELONS

(Administrative Assistant to the Mayor—A. H.—October 19, 1967)

Your recent request, addressed to the Corporation Counsel, Raymond F. Simon, seeking an opinion as to whether the above-mentioned license may be restored or not, has been referred to the undersigned for consideration and response.

Your file, forwarded to this office with your request and herewith returned to you, reveals that Mr. Fuss, the license applicant, was a previously licensed chauffeur in 1955 and that his license was revoked following an incident in which said licensee was apprehended by police in that year while in the process of an assault with intent to rob. Public Vehicle License Commissioner James Y. Carter, in his letter addressed to Mayor Richard J. Daley, notes that no further violations have been recorded involving Mr. Fuss from the time of the revocation of his license to date.

The Order of Revocation to which we refer was based upon good and sufficient cause, as stated in an opinion rendered by then Assistant Corporation Counsel Earl E. Meisenbach, under date of February 14, 1955. The only restriction with respect to the issuance of a public chauffeur's license to one who has been convicted of a felony or a criminal offense involving moral turpitude is that no such license shall issue within eight years after conviction, with the exception of persons receiving an honorable discharge from the armed services of the United States of America and other conditions appearing in Section 28.1-3, Chapter 28.1 of the Municipal Code of Chicago.

The question of whether said license may now be restored, therefore, is one involving the exercise of prudent discretion from the standpoint not only of the merits of the putative licensee, but also from the standpoint of the public welfare with the history of the individual involved as a frame of reference.

CHAUFFEUR'S LICENSE—MARIJUANA POSSESSION

(Commissioner, Public Vehicle License Commission—E. H.—June 4, 1971)

In your letter of May 14, 1971, addressed to the Corporation Counsel, you request an opinion as to whether a public chauffeur's license can lawfully be issued to an applicant who "was arrested for possession of marijuana in June of 1967", (i.e. 4 years ago) "and received one year's probation for this offense."

Section 28.1-3 of the Municipal Code of Chicago does, as you point out, provide, in part:

> "No such license shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon, *traffic in narcotic drugs,* the infamous crime against nature, incest and rape." (Emphasis supplied.)

Your expression of doubt whether mere possession of marijuana constitutes a crime involving "traffic" in narcotic drugs seems well taken. Webster's New Collegiate Dictionary (1953), p. 901, defines "traffic" as, inter alia, "the business of bartering or buying or selling."

It is also directly pertinent that that particular portion of Section 28.1-3 of the Municipal Code was, in *Roth* v. *Daley*, 119 Ill. App. 2d 462, at 468, 469 (1970) declared unconstitutional as to the particular defendant in that case. The Appellate Court found that it effected a classification that had no reasonable basis, since under it an applicant who had perpetrated multiple murders by strangulation, poison or arson could be licensed, whereas Roth, who had been convicted of armed robbery, was forever barred. The same reasoning would apply to barring an applicant who had engaged in the buying or selling of narcotic drugs, while an applicant who used marijuana he had grown in his own back yard could obtain a license.

However, a more formidable objection to Mr. Orellbe's application is to be found in the preceding sentence of the same paragraph of Section 28.1-3 of the Municipal Code. This provides:

> "No public chauffeur's license shall be issued to any person who has been convicted of a felony or any criminal offense involving moral turpitude within eight years prior to his application for such license . . ."

Although the General Assembly has recently taken steps to reduce the status of the possession of marijuana from a felony to a misdemeanor, it appears that at the time of Mr. Orellbe's conviction, possession of marijuana was a felony and that he was thus convicted considerably less than eight years before the date of his application for a license.

Illinois Revised Statutes 1969, ch. 38, § 22-2 (r) (3) defines the term "Narcotic Drugs" as encompassing "Cannabis", including "all parts of the plant Cannabis Sativa L. (commonly known as marijuana)." Section 22-40 of Chapter 38 provides as a penalty for "possessing" "any narcotic drug", for the first offense a fine of not more than $5,000 and imprisonment *in the penitentiary* for not less than two years nor more than 10 years. Section 2-7 of Chapter 38 defines felony as an offense punishable with death or imprisonment in the penitentiary.

It is true that Mr. Orellbe was granted one year's probation for the offense, but Section 118-1 (d) of Chapter 38 provides that "if the defendant is admitted to probation a judgment of guilty shall be entered."

Therefore, the conclusion seems inescapable that Mr. Orellbe has been convicted of a felony and that he is not eligible for a public chauffeur's license until eight years have elapsed since his conviction.

This result, however, may be too harsh in view of the General Assembly's recent partial reduction of the penalty for possession of marijuana. By 1969 and 1970 amendments to Illinois Revised Statutes, ch. 38, § 22-40, possession of 2.5 grams or less of marijuana is, if a first offense, now only a misdemeanor, punishable by imprisonment in a penal institution other than the penitentiary for not more than one year, or by a fine of not more than $1,000, or both.

Your letter of inquiry does not disclose how large a quantity of marijuana Mr. Orellbe was convicted for possessing. If he in fact possessed no more than 2.5 grams, then his offense would not now be a felony. Although it cannot be denied that what he was convicted for was a felony at the time he was convicted and that he was, therefore, convicted of a felony, within the terms of the public chauffeur's license ordinance, nevertheless he may be a proper subject of clemency, if it can lawfully be extended to him.

It is well established law that the granting or revocation of a license is peculiarly a matter of executive discretion. Thus, in *Day* v. *Illinois Liquor Control Commission*, 39 Ill. App. 2d 281, at 287, 288 (1963), the court declared:

> "The question of whether a liquor license should be granted or revoked presents a local problem bearing upon the public health, safety and morals of the community; and we believe that the local liquor control commissioner is better able to solve these problems than anyone else because there is available to him many sources of information from which he can intelligently determine whether or not a liquor license should be revoked, and his decision in this matter should not be disturbed unless there is a clear abuse of discretion by him."

As you know, an "abuse of discretion" implies that the conclusion reached was not only erroneous, but also that it was brought about by prejudice, discrimination, caprice, passion, temper, perversity of will, or partiality. The exercise of honest judgment, based upon facts and conditions carefully considered and inherently reasonable, cannot be said to constitute an abuse of discretion. *People ex rel. Ball* v. *Johnson*, 341 Ill. App. 423, at 428 (1950).

9 McQuillan on Municipal Corporations (1964), p. 180, § 26.74, states:

> "[A] license applicant's past commission of a crime may itself be insufficient for a denial of his application where there is no relation of the crime to the purpose of the particular licensing statute."

And so, in the last analysis, you are the one who is best able to determine whether Mr. Orellbe's offense is relevant to the purpose of the licensing ordinance, and whether, in the light of all the relevant facts and your appraisal of the personality of the applicant, a license should be granted him.

In this connection, it may be of interest to you that there seems to be some expert medical opinion that the use of marijuana does not have an adverse influence on driving an automobile. At least, the following statement appears in *Drugs and Youth*, by Joseph H. Brenner, M.D., Robert Coles, M.D., and Dermot Mezgher, attorney (1970), at p. 33:

> "In contrast to a person intoxicated with alcohol, a person under the influence of marijuana exhibits little or no interest in driving a car. If anything, he becomes overly cautious, so that when he gets behind the wheel, he drives slowly and cautiously."

Perhaps referral of the applicant to a city physician for examination is indicated. In any event, many relevant considerations will doubtless suggest themselves to your informed judgment.

CHAUFFEUR'S LICENSE—PSYCHIATRIC COMMITMENT

(Commissioner, Public Vehicle License Commission—J. S. E.—June 11, 1971)

This is in response to your letter of May 28, 1971, requesting the Corporation Counsel's opinion as to whether a public chauffeur's license should be issued to Victor Freitag, whose license application was disapproved on February 22, 1971.

The disapproval was based on the opinion of the Medical Section of the Chicago Police Department that Mr. Freitag "would be a 'bad risk.' " The Medical Section made this determination apparently on information from the Manteno State Hospital that Mr. Freitag was committed to that institution on April 1, 1967 and was diagnosed to be an "Emotionally Unstable Personality with Manic Features." Some of the symptoms he exhibited were "ideas of persecution by other individuals and homicidal trends towards his wife" and during his commitment "he manifested hostile verbal attitudes towards his hospitalization and his wife." After two months and eight days of commitment he was released from Manteno State Hospital apparently on a conditional discharge to a Chicago Mental Health Clinic for follow-up studies and psychiatric care. After about four months under such care he was unconditionally discharged on October 9, 1967 by the Cook County Court, which determined him "fully recovered" and restored his civil rights, which had been lost upon his commitment.

Mr. Freitag's attorney has requested by letter the immediate issuance of his client's license on the grounds that the Commissioner "acted improperly by denying the license on the basis of a psychiatrist report now over 10 years old without further examination and without allowing Mr. Freitag an opportunity to refute the evidence."

The Corporation Counsel is not in a position to answer your question as to whether or not a chauffeur's license should be issued to the applicant because we have insufficient information as to whether or not he satisfied all of the various requirements for issuance of such a license listed in the Municipal Code of Chicago, § 28.1-3. However, it is clear on the present state of the record that a disapproval of the license application would be invalid because it is not supported by legally sufficient grounds.

The standards for a public chauffeur's license set forth in § 28.1-3 of the Municipal Code of Chicago provide *inter alia,* that the applicant "shall . . . be of sound physique, have good sight, not be subject to epilepsy, vertigo, heart trouble, or other infirmity of body or mind. . . ."

Mr. Freitag's record from Manteno State Hospital indicates that he was adjudicated to be fully recovered from his mental incapacity and that his civil rights were restored by the Cook County Court in 1957. The Illinois Supreme Court has said that after one has been held incompetent "[a] restoration to one's civil rights reverses the presumption of incompetence and revitalizes the presumption of competency." *People ex rel. Drury* v. *Catholic Home Bureau,* 34 Ill. 2d 84, 95 (1966). Similarly, a judicial holding that one is no longer mentally ill would revitalize the presumption of one's mental normality. Thus, in view of the judicial holding that Mr. Freitag is fully recovered and is entitled to his civil rights, the fact of his prior commitment could not legally be a ground for denying him any of his civil rights, including the right to hold a public license.

The rationale for not denying an applicant a license solely because of the fact of his prior commitment to a mental hospital is reinforced by the recently enacted § 9-11 of the Illinois Mental Health Code of 1967 which states that "no admission to any hospital under this Act or finding of need of mental treatment . . . . deprives the person of his right to exercise all his civil rights, including but not limited to . . . rights relating tot the granting . . . of a license, permit, privilege, or benefit pursuant to any law. . . ." Ill. Rev. Stat. 1969, ch. 91½, § 9-11.

Thus, in order to deny the applicant a license on the basis of "infirmity of mind" some evidence as to his present mental condition would be necessary. A psychiatric examination of the applicant would provide the best evidence for a determination of this issue, although it is possible that other competent evidence of his mental infirmity could also be used.

REVOCATION FOR SOLICITING FOR A PROSTITUTE

(Administrative Assistant to the Mayor—C. J. O'C.—August 21, 1967)

Your recent request to the Corporation Counsel for an opinion as to whether the above license may be revoked, based upon information contained in the file attached to said request, has been forwarded to the undersigned for reply.

The Illinois Municipal Code (Ill. Rev. Stat. 1967, Ch. 24) is the enabling authority which delegates to each municipality the power to license certain businesses and to establish the procedures for said licensing.

Pursuant thereto, Section 101-2 of the Municipal Code of Chicago provides that the Mayor shall be the sole licensing authority for those businesses subject to licensing. Section 101-27 of the Code, which provides that the Mayor shall also have the power to revoke licenses, reads as follows:

> "The Mayor shall have the power to revoke any license issued under the provisions of this code for good and sufficient cause. If at any time after the granting of any license, any licensee shall have violated any of the provisions of this code or any of the statutes of the state in the conduct of his business, the Mayor may revoke the license therefor."

There is no requirement in the statutes of the State or the ordinances of the City that the Mayor hold a hearing prior to the revocation of any license issued by him, other than a liquor license.

The significant facts are that on January 11, 1967 the subject licensee was arrested by the Vice Control Division of the Chicago Police Department for operating a prostitution ring. An investigation of the licensee reveals that on February 17, 1949 the licensee was sentenced to 6 months in the House of Correction and 18 months probation on the conviction of the charge of petty larcency.

On January 14, 1958 the licensee was involved in another vice raid. The arrest record fails to show any conviction arising out of the 1958 incident, but his public chauffeur's permit was withdrawn. On March 24, 1961 he applied for a public chauffeur's license and was granted same. The office of the Public Vehicle License Commission had no knowledge of the arrest record of the licensee.

Relative to the incident of January 11, 1967, police officers arrested a prostitute named Cynthia Lee Benson. The prostitute stated that she arrived in Chicago in December 1966 from Detroit. She stated that she had corresponded with another prostitute formerly of Chicago who had moved to California and paid said prostitute $50.00 for a list of prospective vice patrons. Miss Benson was also instructed to contact Jimmy alias "Wheels", the subject licensee, who would steer customers to her. After contacting the licensee she entered into an agreement to the effect that the licensee would steer her customers for the purpose of prostitution and that in return licensee would receive 40% of the price. She also stated that she accepted tricks from another cab driver named John C. Allen. In a 3 week period the licensee referred 12 tricks to her.

The police report included in this file elaborates on the business procedure between the licensee and the prostitute. Police officers went to the girl's apartment and overheard a telephone conversation wherein the licensee stated he was going to bring a customer over and that Miss Benson should charge $30 for the trick. The police observed the licensee and the customer Edward Szykula drive up in a taxicab. Szykula and the licensee were engaged in a conversation for 5 minutes and the officers observed Szykula hand the licensee monies. When the customer entered the vestibule wherein the police officers were standing the officers asked Szykula where he was going. Szykula stated that he was going to see Toni. He showed the officers a piece of paper on which it was written, "AP 3C Toni". Szykula rang the bell marked 3C and told Miss Benson "It's me Toni, Jimmy brought me here." When the officer asked hm why he was there Szykula told the officer that he was going to get laid by Toni and that he had the $30 in his pocket. Szykula was arrested and told the police officers that he had given the licensee $20 for the licensee to arrive to pick up his 40% share of the $30 as was his custom. to drive him to the apartment. The police officers waited for an hour and a half for the licensee to arrive to pick up his 40% share of the $30 as was his custom. Miss Benson stated that because it was a slow night the licensee would probably pick up his money the next day. The licensee was surrendered to the police by his attorney and was charged with soliciting for prostitution. At a hearing in the Criminal Division of the Circuit Court of Cook County the licensee was discharged.

The file contains documents submitted by the Public Vehicle License Commissioner which are the licensee's daily trip sheets. It is the opinion of the Public Vehicle License Commissioner that these sheets reflect that the licensee was not interested in ordinary passengers but was using the taxicab as a front for his vice activities and would leave the motor running with his taximeter flag up to justify his employment to his employer. A perusal of the 1958 police report reveals that the licensee would attempt to obtain a taxicab without a two-way radio so that he would not be dispatched on non-productive calls and that the licensee would park near a business establishment or hotel with his motor running and wave other cabs ahead of him.

The Public Vehicle License Commissioner recommends that the subject license be revoked. In view of the above facts we are of the opinion that there exists "good and sufficient cause" for the Mayor to revoke the subject license.

TAXIMETER VIOLATION—LICENSE REVOCATION

(Administrative Assistant to the Mayor—D. P.—March 21, 1968)

Your request to the Corporation Counsel for an opinion as to whether the above license may be revoked, based upon information contained in the file attached to said request, has been referred to the undersigned for reply.

Section 11-42-6 of the Illinois Municipal Code (Ill. Rev. Stat. 1965, ch. 24, par. 11-42-6) is the enabling act which delegates to the "corporate authorities of each municipality" the power to license cabmen and all others pursuing like occupations.

Pursuant thereto, Chapter 28.1, section 28.1-10 of the Municipal Code of Chicago provides in the second paragraph in part:

> "If any person . . . shall violate any of the provisions of chapter 28 of this code or of this chapter, the commissioner may recommend to the Mayor that his license shall be revoked, and the Mayor, in his discretion, may revoke such license. Upon suspension or revocation of a public chauffeur's license the licensee shall surrender his license certificate to the commissoner."

At a hearing before the Public Vehicle License Commissioner, James Y. Carter, it was determined that the licensee was seen carrying a passenger in Yellow Cab No. 351 with the taximeter unengaged, in violation of the Municipal Code of Chicago, chapter 28, section 11-24; it was further determined that a .32 caliber Budapest-Frommer automatic pistol, owned by the licensee, was also in the vehicle, in violation of chapter 28.1, section 28.1-13, of the Municipal Code of Chicago.

In consequence, the licensee was warned by the Commissioner with respect to the taximeter violation, and given a twenty-nine day suspension with respect to the dangerous weapon violation.

The recommendation of the Public Vehicle License Commissioner, by letter attached, is that there be a revocation of the subject license. In view of the foregoing, it is our opinion that there is sufficient cause upon which the license may be revoked by the Mayor.

CHAUFFEUR'S LICENSE REVOCATION

(Administrative Assistant to the Mayor—D. P.—August 21, 1967)

Your request to the Corporation Counsel for an opinion as to whether the above license may be revoked, based upon information contained in the file attached to said request, has been referred to the undersigned for reply.

Section 11-42-6 of the Illinois Municipal Code (Ill. Rev. Stat. 1965, ch. 24, par. 11-42-6) is the enabling act which delegates to the "corporate authorities of each municipality" the power to license cabmen and all others pursuing like occupations.

Pursuant thereto, Chapter 28.1, section 28.1-10 of the Municipal Code of Chicago provides in the second paragraph, in part:

> "If any person . . . shall violate any of the provisions of chapter 28 of this code or of this chapter, the commissioner may recommend to the Mayor that his license shall be revoked, and the Mayor, in his discretion, may revoke such license. Upon suspension or revocation of a public chauffeur's license the licensee shall surrender his license certificate to the commissioner."

Chapter 28, section 28-15 of the Municipal Code of Chicago provides, in part:

"If any licensee . . . shall solicit any person for transportation to any prostitute or house of ill-fame or disorderly place, or direct or inform any person where any prostitute, house of ill-fame or disorderly place is located, . . . all his licenses shall be revoked."

Chapter 28.1, section 28.1-12, par. 3 of the Municipal Code of Chicago provides, in part:

"No chauffeur shall solicit patronage . . . or solicit any person for transportation to any prostitute or house of ill-fame or disorderly place or direct or inform any person where such prostitute, house of ill-fame or disorderly place is located. . . ."

The file forwarded with your request reveals that the licensee was convicted on April 13, 1967, of soliciting for prostitution and directing persons to house of ill-fame before Judge J. J. Limperis of the Circuit Court of Cook County—First Municipal District—Branch No. 40.

Since Chapters 28 and 28.1 of the Municipal Code of Chicago have been violated, in particular, Ch. 28, section 28-15 and Ch. 28.1, section 28.1-12, par. 3, Chapter 28.1, section 28.1-10 may be invoked. Inasmuch as the recommendation of the Public Vehicle License Commissioner is that there be a revocation of said license, the Mayor may revoke said license.

MIDWAY-O'HARE LIVERY OPERATIONS

(Commissioner, Public Vehicle License Commissioner—B. R.—August 1, 1967)

Your letter of June 1, 1967 addressed to the Corporation Counsel, Raymond F. Simon, has been referred to the writer for reply. Your letter concerns itself with the motor vehicle classification, under the Chicago Municipal Code, of the captioned operation.

The intra-Chicago service provided by Tri-State cannot be classified as a bus operation since it is defined, under Chapter 28-1(n) of the Chicago Municipal Code, as that of a livery operation.

Referring to the rate and time schedule of Tri-State under the heading "Midway Airport Service" which is attached to your letter, it is our opinion that the said company is holding itself out to the public as a coachman in violation of Chapter 28-20 of the Chicago Municipal Code since, as you have indicated, Tri-State does not hold a livery license. We base our opinion upon the fact that Tri-State has represented to the public that it will conduct "Airporter" service between Chicago-Midway and Chicago-O'Hare International Airports at a fare of $9.50. This service is wholly intra-Chicago and is therefore subject to your regulation and control.

Replying specifically to paragraph two of your letter, we are unclear as to the conclusion you draw since Chapter 37 of the Chicago Municipal Code only distinguishes the passenger seating capacity of the motor vehicle in applying the single-trip permit fee of three or five dollars; this fee is not based upon the type of vehicle be it a bus or livery vehicle. Also, your request contained in the last paragraph of your letter is unclear to us.

TEMPORARY REPLACEMENT FOR DESTROYED LIVERY VEHICLES

(Commissioner, Chicago Public Vehicle License Commission—R. L. H. —May 18, 1973)

Your letter of May 15, 1973, requests our opinion related to a specific matter involving Carey of Chicago d/b/a Emery-Drexel, Inc., and the destruction by fire of eleven (11) of the said company's fifteen (15) livery vehicles. We have now received further information to the effect that thirteen (13) vehicles were destroyed rather than eleven. The facts set forth in your letter indicate that these livery vehicles were destroyed in a fire on May 10, and, since so many of their vehicles were so destroyed, Emery-Drexel, Inc., could be forced to cease operations until new vehicles were received.

You also indicate that Emery-Drexel, Inc., is requesting approval for use of rented vehicles as emergency temporary replacements for the destroyed vehicles until properly licensed replacement vehicles can be delivered and placed into service. The rented vehicles would not, of necessity, be titled to Emery-Drexel, Inc., and, due to the status of the rental car business today, would not be black or blue-black as required by Chapter 28 of the Municipal Code of Chicago.

Although there is no provision in Chapter 28 allowing the use of vehicles that cannot be properly licensed thereunder in the livery business, due to the emergency situation and the magnitude of the loss incurred by Emery-Drexel it would only be equitable and proper to allow such use on a temporary basis.

It is therefore our opinion that Emery-Drexel can utilize, on a one-for-one basis, for a period not to exceed thirty (30) days, rental vehicles as temporary replacements for the destroyed vehicles on condition that proper evidence of the required insurance coverage on these rental vehicles be obtained and on further condition that each of said rental vehicles so utilized meets the inspection required a livery vehicle prior to being placed into such temporary service.

In determining the starting and ending dates of the 30-day period referred to hereinabove, we suggest that you take into consideration the statement made to you by Emery-Drexel and the communication from their insurance agent to the home office of their insurer (U.S.F. & G.) dated May 14, 1973, that permanent replacement vehicles would be received in three weeks.

Forwarded herewith is a copy of Emery-Drexel's insurance policy indicating under Insuring Agreement IV(a)(3) that coverage is present for Temporary Substitute Automobiles and a copy of the aforesaid communication from their insurance agent to U.S.F. & G. confirming a phone conversation which confirms coverage. It may also be added that the undersigned did discuss this matter with the named representative of U.S.F. & G., Mrs. Marlene Gromell, and coverage on the temporary rental vehicles was confirmed.

ASSIGNMENT OF LICENSE

(Commissioner, Public Vehicle License Commission—M. M. M.—April 28, 1972)

Your letter of March 28, 1972 has been referred to the writer for reply. You requested an opinion as to whether or not the Paris Cab Company as successor to Hardin Cab Company is liable under provisions of Section 28-13 of the Municipal

Code of the City of Chicago for unpaid judgment against the Hardin Cab Company. Your letter also included a copy of "Assignment of Public Passenger Vehicle License and Assumption of Liability" which states in part:

> For and in consideration of this assignment the assignee does hereby and has undertaken to be and to become liable for all the present and future liabilities of the assignor arising out of the operation of said taxicab license No. ....., in accordance with the provisions of Chapter 28 of the Municipal Code of the City of Chicago particularly pertaining to the rules, regulations, provisions and laws of the Public Vehicle License Commission of the City of Chicago."

While the judgment is against the Hardin Cab Company, the execution of the aforesaid assignment and assumption of liability by the Paris Cab Company brings the Paris Cab Company within the Section of 28-13 and appropriate notice should be sent to the Paris Cab Company, of its liability under the assumption of liability, and Sec. 28-13.

If the judgment is not paid within ninety days, your office should notify the Mayor of this fact and he will revoke the license of the taxicab concerned.

RESIDENCY REQUIREMENT

(Commissioner, Public Vehicle License Commission—H. N. L.—April 12, 1973)

This letter is in response to your inquiry of April 3, 1973 requesting an opinion whether the Chicago Gray Line, Inc. can continue its operations in the City of Chicago under the proposed corporate reorganization outlined in the letter from Mr. Delp to you of March 29, 1973.

In order to operate in Chicago, Chicago Gray Line, Inc. would have to meet all of the qualifications of the Public Passenger Vehicle Ordinance, Chapter 28 of the Municipal Code. Chapter 28 Section 5.1 provides for the qualifications of any public passenger vehicle. It provides that all corporate applicants for public passenger vehicle licenses shall be organized or qualified to do business under the laws of the State of Illinois and have their principal place of business in the City of Chicago. Under the proposed reorganization outlined in Mr. Delp's letter, Chicago Gray Line, Inc. would be merged into the Chicago Calumet District Transit Company, an Indiana corporation with headquarters in Hammond. Mr. Delp indicates that the Chicago Gray Line will continue to have its primary office in Chicago. However, it is not clear whether only the Chicago Gray Line division of the new corporation will have its headquarters here or the entire new corporation will have its headquarters here. According to the ordinance the corporation not only must be qualified to do business under the laws of Illinois but must have their principal place of business in the City of Chicago.

Therefore, it is our opinion that if the Chicago Calumet District Transit Company qualifies to do business in Illinois and if Mr. Delp means that the new corporation will have its primary office in Chicago, we can see no reason, under the facts presented, why the Gray Line could not continue its operations as they have been conducted heretofore.

RECREATIONAL VEHICLE LICENSING

(Superintendent of Police—F. G. S.—May 27, 1970)

Your letters to the Law Department, with reference to State Legislation concerning licensing of recreational vehicles and the possible need for amendments to the Municipal Code of Chicago, has been referred to the undersigned for appropriate action and reply. Your request has been supplemented by additional information received by telephone.

A review of Chapters 27, 29 and 179 of the Municipal Code of Chicago reveals the following: Chapter 179, Section 179-1 of the Code defines "House car-trailer" or "trailer coach" as "any structure for, or used for, living or sleeping purposes, mounted upon wheels and capable of being transported from place to place, either by its own power or by some vehicle attached to it. . . ." Section 179-15 provides that, "It shall be unlawful for any person to maintain any house-car trailer for human habitation upon a plot of ground within the city except in a duly licensed trailer camp."

On the basis of the foregoing sections of the Municipal Code, it is our opinion that no vehicle falling into the category defined therein could be kept on residential property, neither for the purpose of storage or use.

It would further be our opinion that Section 27-319 of the Municipal Code would apply to all vehicles coming under the purview of Section 179.1 and therefore recreational vehicles as defined in Act 1910 approved August 21, 1968, passed by the Illinois State Legislature, would be subject to Section 27-319 and therefore could not park on any residential street "for a longer period than is necessary for the reasonably expeditious loading or unloading of such vehicles, . . ." or on "any business street in the city for a longer period than sixty minutes or for such time as is necessary for the reasonably expeditious loading or unloading of such vehicle, . . ."

For purposes of enforcement of these provisions of the Municipal Code it should be noted that vehicles in this category would have state license plates bearing "RV" suffix letters and City of Chicago metal vehicle plates in Class "TA" or "TB".

With respect to the matter of operation of recreational vehicles on boulevards, there is no provision in the Municipal Code at the present time which would prohibit the operation of recreational vehicles on Boulevards. Section 27-275 of the Municipal Code makes it "unlawful to operate any vehicle upon any boulevard (a) when such vehicle is used for carrying freight or other goods and merchandise for commercial purposes, (b) when such vehicle is designed primarily for carrying freight or other goods and merchandise, and (c) when such vehicle is used for carrying freight or other goods and merchandise on the outside of said vehicle, . . ." In our opinion, recreational vehicles as defined by Statute or as defined under Chapter 179 of the Municipal Code do not fall within the ambit of Section 27-275 of the Municipal Code. Therefore, it is our opinion that there is no ordinance which prohibits the operation of recreational vehicles on Boulevards in Chicago.

With respect to the matter of licensing of recreational vehicles by the City of Chicago to conform with the State Statute, it is our opinion that Section 29-5 of the Municipal Code under "Trailers" makes adequate provision for the licensing of recreational vehicles by gross weight up to and including 8,000 lbs. Discussions are now under way to give consideration to an amendment to this ordinance to cover licensing of recreational vehicles over 8,000 lbs.

It is our further opinion that, with the amendment of Section 29-5 of the Municipal Code to cover recreational vehicles above 8,000 lbs. the distinction between permanent recreational vehicles and passenger vehicles occasionally used for recreational purposes would be clearer by virtue of the license category the owner would elect to use, insofar as dual purpose vehicles are concerned, such as a Volkswagen mini-bus or a station wagon. Once a vehicle is registered as a recreational vehicle its purpose and use is clear and its regulation would fall within the scope of ordinances cited earlier.

REFUND OF VEHICLE TAX

(City Collector—D. P.—May 6, 1969)

Your letter to Raymond F. Simon, Corporation Counsel, dated April 22, 1969, asks this office to evaluate a claim by Courtesy Lease Save Plan, Inc., for refund of motor vehicle license fees paid for vehicles which were sold "between the purchase date and the deadline date." Attached to your letter are copies of invoices for each of the vehicles sold.

The motor vehicle license is an annual tax, due January 1 of each year; with the exception of the provision in Section 29-5, Chapter 29, Municipal Code of Chicago, dealing with vehicles purchased in the second half of any year, no pro-ration is made for vehicles owned for less than one year. Consequently, the vehicle owner is subject to the entire tax on January 1, even if, for example, he should sell the vehicle on January 2. The fact that *enforcement* of the ordinance is stayed until February does not mean that the tax is not *due* until the February "deadline date;" the delay in enforcement is provided as a courtesy to motor vehicle owners and, as a practical matter, to permit proper processing of the many applications made in your office at the beginning of each year.

The motor vehicle license fee is a tax upon the owner for the privilege of using city streets and is measured by the number of vehicles owned and used; once the owner has paid the fee he is exempt from further payment for the remainder of the year. Thus, he may transfer any license purchased to any other vehicle during the year without additional payment.

In applying these principles to the situation you have described, it is important to establish the date of sale of each of the motor vehicles in question. The invoice copies attached to your letter indicate that refund is requested for 33 automobiles. However, except for two dated in December of 1968, the invoices have 1969 dates. Assuming that the dates refer to the date of sale, we must conclude that the license fees in question were properly collected for all of the vehicles still owned by Courtesy Lease Save Plan, Inc., after December 31, 1968. Refund would therefore be allowed only for the two vehicles sold before that date. Nothing, of course, precludes the applicant from transferring the licenses purchased to any other vehicles it may purchase during 1969.

We have assumed in our discussion that the invoice dates record the date of sale. Rather than relying upon these dates, your office may make an independent examination as to the actual date upon which Courtesy's ownership of any particular vehicle terminated; the same principle of refunding only fees paid for vehicles sold in 1968 would apply.

LIABILITY OF ASSIGNEE

(P. E. M.—A. H.—March 31, 1970)

Your recent letter addressed to Mayor Richard J. Daley, concerning the above-captioned matter, has been referred to the Law Department and to the undersigned for consideration and response.

You state that your client secured a judgment of $10,000.00 against "the person holding license #2190 of the Public Vehicle License Commission of the City of Chicago," and that the Illinois Appellate Court affirmed said judgment against the Aero Cab Company, the assignee of license #2190 which has not been paid, but that said license has not as yet been revoked as provided by the terms of Chapter 28, Section 28-13 of the Municipal Code of Chicago. You ask that the matter be investigated and that you be advised with respect to the conclusions resulting therefrom.

An examination of the Appellate Court report in *Zydzik* v. *Schiff and Aero Cab Company*, 116 Ill. App. 2d 163, reveals that your client, John Zydzik, was injured in an automobile accident which involved a taxi operated by the Flash Cab Company, owned by Edwin Schiff and driven by Robert Munn, who died while the case was pending. Also during pendency of the case, defendant Schiff contracted to assign the license, under which the taxi involved in the accident was operated, to Aero Cab Company. Judgment for plaintiff was entered against Schiff in the amount of $10,000.00 and plaintiff brought citation proceedings against Aero Cab in order to enforce his judgment against the taxicab license assigned thereto. The Appellate Court held, among other things, that Aero Cab assumed the liability in question in view of the terms of Chapter 28, Section 28-9.1 of the Municipal Code of Chicago, which provides that the assignee undertake and become liable for all liabilities of the assignor arising out of the operation of the taxicab, which the Court interpreted to include this accident.

The opinion of the Appellate Court hereinabove referred to is dated October 28, 1969. Unless a petition for rehearing or a petition for leave to appeal to the Illinois Supreme Court has been filed, it would appear that the judgment against said defendants is final.

Accordingly, we are advising Commissioner James Y. Carter to ascertain whether any further legal action, such as outlined above, has been taken and, if not, to notify the Mayor of said judgment and the applicability of Section 28-13 to said facts for appropriate action.

TAXICAB INSURANCE

(E. K. B.—H. A. C.—July 26, 1967)

In reply to your letter of May 25, 1967 regarding insurance carried by a cab company under the Chicago Ordinances, enclosed please find copy of the City Code, Chapter 28-12.

Please note that all such insurance policies or surety bonds must be filed with the Public Vehicle License Commissioner, 1121 S. State Street, Chicago, Illinois, and the said Commissioner advises us that Red Top Cab Company has filed same.

In Illinois the name of the insurance company is a proper matter for discovery proceeding by a plaintiff once a lawsuit has been filed.

TAXICAB INSURANCE

(Public Vehicle License Commissioner—M. J. D.—February 14, 1973)

Your recent letter addressed to Richard L. Curry, Corporation Counsel of the City of Chicago requesting an opinion as to whether or not an insurance policy of $100,000.00 would be acceptable to your office which would fulfill the requirements of Chapter 28 Section 28-12 of the Municipal Code of the City of Chicago and the "Illinois Vehicle Code", has been referred to the undersigned for reply.

Chapter 95½ Section 8-104 states in part as follows:

"1. A Surety Bond or Real Estate Bond filed as proof as provided in Section 8-103 shall be in the sum of $50,000.00 for each motor vehicle operated by the owner providing the motor vehicle is subject to Section 8-101."

Chapter 28 Section 12 of the Municipal Code of the City of Chicago states in part as follows:

"Every cabman or coachman shall carry . . . . . insurance . . . . . The . . . insurance policy . . . shall be . . . at least $5,000.00 for property damage and

$50,000.00 for injuries to or death of any one person and each vehicle having seating capacity for not more than 7 adult passengers shall be insured for the sum of at least $100,000.00 for injuries to or death of more than one person in any one accident . . . ."

It is the opinion of this office that a policy of $100,000.00 combined Single Limit Liability Policy would meet the requirements of Chapter 95½ Section 8-104 Ill. Rev. Stats. (1971) and in fact would be broader coverage than would be required by Chapter 95½ Section 108-4.

Your letter is accompanied by a sample policy from an insurance company. In our opinion, the sample insurance contract is not acceptable to the City of Chicago and is inconsistent with the terms of Chapter 28, Section 28-12 of the City Ordinance for the following reasons:

1. Section 28-12 of the Code provides, inter alia, that the insurance contract, "shall contain . . . the public passenger vehicle license number." This number is not provided for in the sample contract.

2. In addition to the basic insurance coverage required of seven passenger vehicles, Section 28-12 requires additional insurance coverage for each vehicle having seating capacity for more than seven adult passengers. Item 8 of the sample contract which pertains to the maximum liability of the company neither specifically limits operations to seven passenger vehicles nor does it provide for the requisite additional insurance for passenger capacity over the seven passenger limit.

HOLDING TAXI LICENSE IN TRUST

(Commissioner, Public Vehicle License Commission—H. N. L.—April 27, 1973)

This letter is in reply to your letter questioning whether it is possible to transfer a taxicab license to a Chicago Bank as Corporate Trustee, under an inter vivos trust.

Due to the fact that Chapter 28-9.1 of the Municipal Code allows an administrator to hold a taxicab license, it can be inferred that the City Council did not intend to prohibit fiduciaries from holding taxicab licenses. The relationship between an administrator and the estate is similar to that of a trustee and beneficiary. *Boghosian* v. *Mid-City National Bank of Chicago,* 25 Ill. App. 2d 455 (1960). The relationship is fiduciary in character and there appears to be no difference between the two relationships for our purposes.

Heretofore licenses have not been granted to trustees. The reason usually given for this is that by allowing a trustee to hold a license, the real party in interest, the beneficiary of the trust, is not known. However, under the present system when a corporation holds a license, only the officers of the corporation are known. The real parties in interest, the stockholders, are not known. If we are concerned about knowing the identity of the real parties in interest, we could demand that we be provided with the identity of the beneficiaries, a copy of the trust agreement and any amendments to the trust. If this is done, we would avoid any possibility of hidden beneficiaries.

REVOCATION FOR USE OF FIREARMS

(Commissioner, Public Vehicle License Commission—A. H.—March 7, 1969)

We have your letter in which you request an opinion as to your position in two cases wherein two cabdrivers, in the process of being held up at gun point, returned fire with the holdup men by pulling their own guns from the seats of

their taxicabs and shooting the alleged holdup men to death. You state that in both cases no charges were placed against the taxicab drivers. You ask what effect Section 28.1-13 of the Municipal Code of Chicago would have in these cases.

Section 11-42-6 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, ch. 24, par. 11-42-6) is the enabling act which delegates to the "corporate authorities of each municipality" the power to license cabmen and all others pursuing like occupations.

Pursuant thereto, Chapter 28-1, Section 28.1-10 of the Municipal Code of Chicago provides in the second paragraph, in part:

> "If any person . . . shall violate any of the provisions of Chapter 28 of this code or of this chapter, the commissioner may recommend to the Mayor that his license shall be revoked, and the Mayor, in his discretion, may revoke such license. Upon suspension or revocation of a public chauffeur's license the licensee shall surrender his license certificate to the commissioner."

Further, Chapter 28.1, Section 28.1-13 of the Municipal Code of Chicago states:

> "It is unlawful for any chauffeur while in charge of a public passenger vehicle to have any deadly weapon in his possession or in or about the driver's compartment of said vehicle."

Your letter sets forth no extenuating circumstances wherein either of the drivers to whom you refer were licensed to carry the weapons used, such as police officers working parttime or other individuals specially licensed to carry firearms.

Assuming that there are no such extenuating circumstances as aforementioned, it is our opinion that Section 28.1-13 applies to these facts, that there is therefore sufficient cause for the Mayor to find that each licensee is not a fit person to be operating a public passenger vehicle and, upon the recommendation of the Public Vehicle License Commissioner, said license may be revoked by the Mayor.

As you know, a policy has been established of providing a hearing for holders of non-liquor licenses before the Mayor's Deputy Hearing Officer in cases such as this and it is recommended that this procedure be followed in the instant circumstances.

CHICAGO VEHICLE LICENSE

(C. V. L.—D .P.—February 8, 1968)

Your letter of January 3, 1968, to the City Clerk of Chicago states that your client, Riggs Food Express, Inc., has received two applications for the Chicago vehicle license. You request "information, including applicable provisions of the City law, wherein and whereby Riggs Food Express would be subject to the provisions of the City tax."

The fact that Riggs has been supplied with applications seems to indicate that it has registered vehicles in the City of Chicago for the Illinois state license.

The applicable provisions of the Municipal Code of Chicago read as follows, in part:

> "Unless the context requires other interpretations, the following words and terms are defined, for the purpose of this code, as follows: . . . .
> (e) *person*—any natural individual . . . or corporation. . . . [ch. 1, sec. 1-9.]
> "It shall be unlawful for any person residing within the city to use, or to cause or permit any of his agents or employees to use any motor vehicle upon the public ways of the city, unless such vehicle be licensed as hereinafter provided." [ch. 29, sec. 29-2.]

Whether a corporation is considered "residing within the city" for wheel tax purposes is, of course, a question of fact, answered generally by referring to the significance of the corporation's operations within the taxing unit.

ISSUANCE OF LICENSE BY BANKS

(City Collector—R. F. F.—November 10, 1971)

This is in response to your letter of July 1, 1971, in which you state that the City Collector and the City Clerk are considering allowing banks and other financial institutions to issue the motor vehicle licenses required by Chapter 29 of the Municipal Code. You inquire whether there is authority to allow persons other than the Collector and the City Clerk to sell these licenses.

The new Constitution adopted in 1970 specifically allows municipalities to cooperate with private organizations to achieve municipal purposes. Article VII, Section 10, states that "Units of local government . . . may contract and otherwise associate with individuals, associations and corporations in any manner not prohibited by law or by ordinance."

Two avenues are open to you. The first is the appointment by the Collector and City Clerk of certain banks or other financial institutions as deputies. The second is authorization of the City Council, by ordinance, for you to appoint financial institutions to make such sales.

The Illinois Municipal Code contains several sections which authorize the City Collector and the City Clerk to appoint subordinates to carry out the functions of their respective offices. Sections 3-6-2, 3-9-2 and 3-10-9 of the Illinois Municipal Code (Ill. Rev. Stat. 1969, ch. 24, pars. 3-6-2, 3-9-2 and 3-10-9). Pursuant to these sections you may appoint financial institutions as special clerks for the collection of the vehicle tax and issuance of licenses. If such a course is chosen, the Collector and Clerk should increase their bonds, for Section 3-9-2 of the Illinois Municipal Code provides that the Clerk and Collector are financially responsible for their subordinates. In addition, if this course is chosen, the financial institutions, as deputies of the City Collector, could collect only the amount of tax specified by ordinance. Thus, no service charge could be collected, because nothing authorizes the City Collector to make such a charge.

Alternatively, the Council, by ordinance, may provide for the collection of tax and issuance of licenses by financial institutions as agents for the Clerk and Collector. At present a State statute allows the Secretary of State to license "remittance agencies" for similar purposes. See Illinois Vehicle Code, Ch. 3, Article 9, (Ill. Rev. Stat. 1969, Ch. 95½, par. 3-901 et. seq.). Such a City ordinance could provide safeguards, such as the financial institutions providing their own bonding, and penalties for misfeasance. Moreover, such an ordinance could authorize the financial institutions to collect a nominal service charge, if desired. This course would seem preferable.

WHEEL TAX—RESIDENCE

(R. R. R.—D. P.—March 26, 1969)

Your letter of March 3, 1969, refers to your earlier exchange of correspondence with this office concerning amendments to the Chicago Wheel Tax Ordinance (Municipal Code of Chicago, Chapter 29). You ask for further comment on the question of local residence in the light of prior opinions of this office which you believe to be inconsistent with the position we now take.

You refer specifically to two opinions of this office, one written in 1954 (24 Opinions of the Corporation Counsel 356), the other in 1942 (21 Opinions of the Corporation Counsel 152). Because the 1954 opinion is apparently not concerned with a corporation which controls any property within the city, the con-

clusions reached there would seem to have no bearing on your problem since in your earlier letter you stated that your client leases facilities in Chicago. The 1942 opinion, to the extent that it refers to residence, appears to be based on a misinterpretation of the cases relied upon. For example, it refers to the case of *Fairbanks Shovel Co.* v. *Wills,* 240 U.S. 642. Corporate residence was there limited to the county of the principal office only because the chattel mortgage act so required. The opinion also cites *Chicago, etc. R. R. Co.* v. *Bank of North America,* 82 Ill. 493. This case would seem to provide better authority for the position we now hold than for that expressed in the opinion of 1942. It has this to say with respect to the question of residence:

> "The citizenship (if that term may strictly be applied to a corporation) of the defendant, it will be seen, is unimportant—it will be sufficient if it is a *resident* of the county; and for the purposes of this question, we think, the well known distinction between *citizen* and *resident,* as applicable to persons, should be observed. The rule laid down, and since recognized by this court, in *Bristol* v. *The Chicago and Aurora Railroad Co.* 15 Ill. 436, is this: 'The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised.' And it was, therefore, held, that the corporation, in that case, had a legal residence in any county in which it operated its road."

Our position is fundamentally the same. We suggest that it is possible to reside in more than one place at the same time and that the statutory phrase "city . . . in which the owner resides" (Illinois Revised Statutes 1967, Chapter 95½, Paragraph 32a), does not define a single, specific locus. The phrase, as are most legal phrases, is a convenient shorthand expression for certain legislative policy objectives; what the phrase means is dependent upon what the objectives are.

Illinois Revised Statutes 1967, Chapter 95½, Paragraph 32a, reads, insofar as is here relevant, as follows:

> No owner of a motor vehicle or motor bicycle who shall have obtained a certificate from the Secretary of State and paid the registration fee . . . shall be required by any city . . . other than a city in which the owner resides to pay any tax or license fee for the use of such motor vehicle or motor bicycle.

A similar enabling provision in the Municipal Code of 1961 (Ill. Rev. Stat. 1967, Ch. 24, Par. 8-11-4) restricts use of wheel tax funds to

> The construction, maintenance, and operation of testing stations . . . . The balance . . . shall be used for the purpose of improving, paving, repairing or maintaining the streets and other public roadways within each city . . . [and] 35% of such fees may be used also for payment of salaries and wages of policemen engaged in the duty of regulating traffic.

Obviously, this last quoted language places the principal burden of road maintenance upon the road user; the logical extension of this policy would be to tax each vehicle wherever and whenever it is used, or to apportion any tax between the proper municipalities. Obviously finding this to be impractical, the General Assembly included the residence limitation of paragraph 32a, which was rationalized by the Illinois Supreme Court in this way:

> . . . [T]he legislature did not intend that the owner of an automobile should be held up and made to pay a license fee or tax by the authorities of every city, town or village which the owner visited or passed through. (*Heartt* v. *Downers Grove,* 278 Ill. 92.)

As a result, it is necessary to reconcile two policies: (1) taxation should be related to use of the roads, and (2) harassment from municipalities "visited or passed through" is to be avoided. The ordinance definition of "residing within the city" meets, we believe, the requirements of these two principles. It more adequately implements the statutory policy of relating taxation to use than does the former practice. At the same time, it is not broad enough to inconvenience vehicle owners visiting or passing through the City of Chicago.

The ordinance definition finds support in the case law of this jurisdiction and others. "Whether the term 'residence' used in a statute, will be construed as having the meaning of 'domicile', or the term 'domicile' construed as 'residence' depends upon the purpose of the statute and the nature of the subject matter, as well as the context in which the term is used" (*In re Estate of Schultz,* 316 Ill. App. 540, at 552; see also *Stein* v. *County Board,* 85 Ill. App.2d 251). When accurately and precisely used, the courts have noted, the terms are not convertible. (*In re Estate of Schultz,* Ibid.; *Russell* v. *Holland,* 309 Mass. 187, 34 N.E. 2d 668; *In re Takahashi's Estate,* 113 Mont. 490, 129 P.2d 217; *In re Jones' case,* 341 Pa. 329, 19 A.2d 13; *Kemp* v. *Kemp,* 172 Misc. 788, 16 NYS 2d 26). "In the *Pope* case, (370 Ill. 196) we endeavored to make it clear that there is a distinction between place of residence and domicile. . . ." (*Clark* v. *Quick,* 377 Ill. 424.) More precisely, it has been held that *"residence* differs from *domicile* in that residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place, and also an intention to make it one's domicile" (*In re Kowalke's Guardianship,* 46 N.W. 2d 275 (Minn.)).

Further, it has been acknowledged, in *Chicago & N.W. Ry.* v. *People,* 183 Ill. 196, that multiple residence is possible:

> Railroad corporations have frequently, for purposes of determining the venue of suits against them, been regarded and held to be residents of each jurisdiction or municipality through which the line of road passes. It is urged such corporations, for the purposes of enabling them to avail of the privileges of discharging in labor the district road taxes levied on their property, should be regarded as residing in each road district within which the line of the road is located. This may be conceded, providing the company has an agent or representative "residing" in the district. . . .

As your letter acknowledges, such case law as exists on the subject of wheel taxes in the State of Illinois has not specifically concerned itself with the issue of residence. Thus, in *City of Flora* v. *Borders,* 342 Ill. 208, by stipulation, the defendant's operations were declared to be almost ntirely outside of the city except for occasional hauling with his truck. In *Heartt* v. *Downers Grove,* (278 Ill. 92) a doctor drove into the city on occasional professional calls. In *Benton* v. *Whaley,* 230 Ill. App. 309, the defendant lived in a nearby city where he operated a garage business with a taxi service, "taking passengers wherever they may desire to go, some of his trips necessarily being in, about and through the City of Benton. He has a telephone for which he pays rent installed in the place of business of the Rexall Taxi Company, located in a drug store on the public square in Benton, *but he does not keep his cars there nor bear any of the expense of maintaining said taxi stand."* (Emphasis supplied.) In none of the cases was there evidence of the kind of permanency required under the Chicago Wheel Tax Ordinance.

A Missouri appellate court has directly considered the question confronting us. It found that a corporation with its principal office in Sikeston, Mo., and a branch office in St. Louis, was liable under a St. Louis ordinance similar to Chicago's, for non-payment of a fee on trucks used in St. Louis:

> We think it more consonant with the reason and purpose of the statute that the legislature meant the words "residing in such municipalities", to apply to any owner whose truck was regularly engaged in business in such municipality, and the fact that the owner, for the purpose of voting or paying taxes, or for any other reason, has established a domicile elsewhere, would not exempt the truck from the license tax. Such construction results in no hardship to anyone, and gives a meaning to the statute which would not destroy its purpose, which is that every truck engaged in transporting freight is subject to a license tax in the city in which it is usually kept and operated. [*City of St. Louis* v. *Temples,* 149 S.W. 2d 888].

We conclude, therefore, that the ordinance definition of "residing within the city" is entirely in accord with Paragraph 32a, Chapter 95½, Illinois Revised Statutes 1967.

XEROXING OF LICENSES AND CITATIONS

(Manager, General Office Accounting, Kraft Foods—H. L. R.—February 7, 1968)

Your recent letter addressed to City Hall, has been referred to the Corporation Counsel's office for response. You inquire as to whether there are any laws which prohibit the making of Xerox or photocopies of Vehicle license identification cards and traffic violation citations.

Neither the Illinois Revised Statutes, nor the Municipal Code of Chicago, prohibit the copying of the above mentioned documents for business record purposes.

Section C. AMUSEMENT LICENSE AND TAX

BOOK STORES CHARGING ADMISSION

(Administrative Assistant to the Mayor—M. S. J.—January 29, 1970)

Your recent memorandum sent to this office has been referred to the undersigned for response. You ask whether book stores charging admission to the premises are required to hold a Public Place of Amusement license. It is our understanding, based upon the enclosed communication from Captain Raymond Clark, Director of the Vice Control Division of the Chicago Police Department, that numerous book stores located throughout the City of Chicago are now charging admission to their premises. Investigation by police personnel indicates that all of these stores sell books that are pornographic.

Section 104.1-2 of the Municipal Code of Chicago prohibits any person from operating, for gain, any amusement not exempted in Section 104.1-1 of the Municipal Code of Chicago without first obtaining a Public Place of Amusement license. Section 104.1-1 does not cover book stores. The assessment of an admission fee contemplates that the patron seeking admittance will receive satisfaction by his entry into the premises where he can view books available there. The books available to the patron constitute the amusement. It is concluded, therefore, that the operation in question is not exempt from the licensing requirements but does, in fact, fall within the general category of amusements requiring a license.

A party who acquires a Public Place of Amusement license is still obliged to comply with all of the other existing laws. No licensee may sell or exhibit materials he knows or has reason to know are obscene. Prosecution is possible under Chapter 38, paragraph 11-20, Illinois Revised Statutes 1967 and Section 192-9 of the Municipal Code of Chicago. Therefore, whether the proper licenses are secured or not, the police department may enforce the last two provisions cited. In the absence of an amusement license, a citation should also be given for operating without such a license.

IDENTIFICATION CARDS FOR CABARET EMPLOYEES

(Vice Chairman of the Council, New York, N.Y.—D. P.—November 1, 1967)

Mayor Richard J. Daley has directed this office to consider your recent letter respecting identification cards for cabaret employees.

No ordinance of the City of Chicago requires that employees of public dance halls and cabarets carry identification cards. For local regulation of these kinds of places, primary reliance is placed upon the system of licensing owners rather than upon any program of maintaining employee information. However, state law provides for a limited procedure under the Liquor Control Act (Ill. Rev. Stat. 1965, ch. 43, par. 120 (11)) which prohibits issuance of a retail liquor license to "a person whose place of business is conducted by a manager or agent unless the manager or agent possesses the same qualifications required of the licensee. . . ." Information, then, must be supplied as to these employees. This provision does not extend to other employees, such as entertainers, and in no case are identification cards required.

EXEMPTION FOR COFFEE HOUSE

(H. M. H.—D. P.—September 22, 1967)

Your recent letter to this office requests an "exemption" for the proposed Young Peoples' Coffee House from city ordinance provisions requiring a "public place of amusement" license.

This office has no authority to grant exemptions from any ordinance requirement of the City of Chicago. You may, of course, wish to discuss the matter with your alderman; he will be able to advise you as to any action that may be taken by the city council.

In any case, it appears that the activities contemplated by your group would be covered by the "class 2" amusement license, for which a fee of $25.00 to $50.00 is charged, depending upon the floor area of the establishment involved.

This conclusion is based upon your description of the purposes of your group. You anticipate the following activities: informal discussions; discussions with guest speakers; viewing of educational, non-commercial films; and, occasionally, music volunteered by local musicians. It thus appears that your activities may be principally characterized as involving participation rather than exhibition.

As you may know, apart from the license fee, a 3% tax is imposed upon the gross receipts of all places of amusement. Should you need further information respecting this tax, you will find it helpful to discuss your situation with the Comptroller's office, 501 City Hall.

You should also be aware of the fact that a city ordinance requires that all motion pictures exhibited in public places, except news films, be first submitted to the Film Review Section of the Chicago Police Department. The Superintendent of Police will then, within three days issue or deny a permit for the motion picture. Of course, once a permit has been issued for a particular motion picture, the permit may be transferred to subsequent exhibitors without further review.

AMUSEMENT LICENSE NEAR EDUCATIONAL INSTITUTION

(Administrative Assistant to the Mayor—R. N. K.—May 6, 1970)

Your recent inter-office communication addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for response. You request an opinion regarding the applicability of Chapter 104.1, Section 104.1-5 of the Municipal Code of Chicago to an application for a public place of amusement license for the premises at 546 S. State Street, Chicago, Illinois.

Chapter 104.1, Section 104.1-5 of the Municipal Code of Chicago provides in part that no public place of amusement license shall be issued for any place within two hundred feet of any building used exclusively for educational purposes, unless the place to be licensed has been established as a public place of amusement before the establishment of the educational institution.

Investigation reveals that the public place of amusement license issued to the Rialto Burlesque Theatre, Inc. for the premises at 546 S. State Street was revoked on November 20, 1967. Presently one Leroy C. Griffith is applying for a public place of amusement license for these premises. The premises at 546 S. State Street is 179 feet from Jones Commercial High School.

Since Jones Commercial High School, an educational institution, was established prior to the application by Leroy C. Griffith, his application for a public place of amusement license for the premises at 546 S. State Street should be denied as the premises are within 200 feet of a building used exclusively for educational purposes.

The fact that the premises were used at one time for a burlesque theatre prior to the establishment of Jones Commercial High School is immaterial. Since the premises at 546 S. State Street have been vacant since 1967, the date that Mr. Griffith applied for a license would be the date that the premises would be considered established for the purposes of Section 104.1-5.

AMUSEMENT LICENSE FOR "HOTELS"

(City Collector—M. J. D.—March 7, 1972)

We have your letter dated March 1, 1972 in which you request our opinion as to whether a Public Place of Amusement License is necessary for a hotel offering their guests "first run motion pictures" to be viewed through closed circuit television in certain rooms of said hotel with a charge to be made for viewing said "motion pictures".

Section 104-1 of the Municipal Code of Chicago provides, in part:

"The word "amusement" means, (1) any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 of the Municipal Code of Chicago provides, in part:

"A license tax is imposed upon all amusements within the city, excepting automatic amusement machines, of an amount equal to three percent of the gross receipts from admission fees or other charges, exclusive of federal and state taxes, to witness or to participate in such amusements; provided, however, that said tax shall not apply to or be imposed upon the privilege of witnessing or participating in any stock show or business show, or any amusement the proceeds of which, after payment of reasonable expenses, inure exclusively in the benefit of:

* * *

"Provided, however, that said tax shall not apply or be imposed upon the gross receipts of motion picture shows where the admission fees do not exceed ninety cents per single admission; and in the case of motion picture shows, where, in whole or in part, the admission fees exceed ninety cents per single admission, said tax shall apply to and be imposed upon that portion of the gross receipts in excess of ninety cents per single admission derived from admission fees in excess of ninety cents. The exemption provided herein shall apply only to motion picture shows which exhibit motion pictures exclusively."

Section 104.1-2 of the Municipal Code of Chicago requires a license to be taken out by public places of amusement. Section 104.1-1 defines a public place of amusement as "any building or part of a building, park or grounds used or

intended to be used for any amusement as defined in Chapter 104 of this Code. . . .".

A "Motion picture show" is one of the amusements defined in Chapter 104 of the Municipal Code of Chicago.

In our opinion the aforementioned sections clearly indicate that the showing of a motion picture, whether being viewed in a movie house or by a closed circuit television comes within the purview of the aforementioned sections and, therefore, would require a City of Chicago amusement license. Furthermore, it is our opinion that each room used for the viewing of the motion pictures would be required to have a separate Public Place of Amusement License.

Chapter 104.1-7 of the Municipal Code of Chicago divides Public Place of Amusement licenses into three classes; Class 1, Class 2 and Class 3. The aforementioned contemplated use in our opinion comes within the purview of Class 1 and the applicable fee as prescribed in Chapter 104.1-8 of the Municipal Code of Chicago would apply. Finally, the use of closed circuit television for the showing of motion pictures is not entitled to be exempt from the payment of the City's amusement tax on the first ninety cents admission price to view the motion picture as provided in Section 104-2 of the Municipal Code of Chicago.

Section 104-2, which governs the ninety cent exemption, provides that such exemption shall apply to "motion picture shows which exhibit motion pictures exclusively". It is clear that the term "Motion Picture shows" is applicable only to a performance of motion pictures exclusively. The sole purpose of the exemption is for the benefit of theatres showing motion pictures exclusively.

In addition, Chapter 155 of the Municipal Code of Chicago provides for the inspection by the Commissioners of Police of all motion pictures before their exhibition in any public place, and further provides for the payment of $3.00 for each 1,000 lineal feet of film or fraction thereof, in the event that a permit is granted.

The manifest purpose of the requirement of prior inspection and the issuance of a permit is to prevent the exhibition of immoral, obscene or otherwise harmful motion pictures in public places. Section 1 of Chapter 155 of the Municipal Code of Chicago makes it unlawful for any person to show or exhibit any motion picture without a permit, "in a public place, or in a place where the public is admitted".

It is our opinion, therefore, that the inspection and permit requirements of Chapter 155 of the Municipal Code of Chicago are applicable to the contemplated use.

SHOWING OF MOTION PICTURES VIA CLOSED-CIRCUIT TELEVISION TO HOTEL GUESTS

(City Collector—R. F. F.—March 29, 1973)

You have sent us a letter from attorneys representing Computer Television, Inc., and requested our opinion whether their proposed system of showing motion pictures via closed-circuit television to hotel guests is subject to licensing or taxing ordinances of the City of Chicago. The system is described as follows:

Computer Television will operate from a basement location in a hotel. Video movie signals will be generated from video tape cartridge machines located in the basement transmission area and will be directly fed into either the hotel's master antenna apparatus normally used to receive VHF-UHF commercial TV transmission or a coaxial cable system connected to every room. A hotel guest can receive movie transmission on the guest's room TV by either making a request at the hotel desk or activating a device within the room. The precise system used will vary from hotel to hotel. The guest subsequently will be billed for the movie

viewed in his hotel room. The system used in a given hotel may also provide for guest message indicators, automatic room billing and the like, all within the privacy of the hotel guest's room.

Of the possible City of Chicago ordinances to which the system might be subject are the public place of amusement licensing and taxing ordinances. A preliminary interpretation of these ordinances leads us to conclude that since movies would be viewed by bona fide hotel guests in their rooms, and not in a place open to the public, the system would not be a "public place of amusement" for the purpose of these ordinances. Thus, the system, as described, does not appear to be subject to City of Chicago licensing or amusement tax ordinances.

TAX ON JUKEBOX IN HIGH SCHOOL

(City Collector—G. F. H.—January 22, 1973)

In response to your inquiry whether the Student Council of John F. Kennedy High School is required by law to pay the City's annual amusement tax for the jukebox which it owns, it is the opinion of this Office that the tax is not applicable.

Sections 104.4 and 104.5 of the Municipal Code of Chicago provide for the payment of an amusement tax on automatic amusement devices by persons who use or operate such devices for gain or profit. It is our understanding that the Student Council owns and operates the jukebox, and simply redistributes the proceeds to the student body via other student organizations. In view of these facts, it is our determination that the Student Council does not qualify as a person operating such a device for profit or gain, as that language is intended in the taxing ordinance.

MOTION PICTURES IN RESTAURANTS

(P. G. H.—W. J. K.—April 10, 1972)

Your letter addressed to Mr. Richard L. Curry, Corporation Counsel of the City of Chicago, has been referred to the undersigned for reply.

In your letter you state that your client is marketing motion picture cartridges for exhibition on screens in various commercial and retail outlets such as restaurants, cocktail lounges, and discotheques. The entertainment is to be provided without charge to the public and the proprietor pays for the service.

You further request information as to whether any state or local laws prohibit or place restrictions upon the showing of motion pictures in places of public resort and does the showing of such films necessitate the establishment to obtain an entertainment or other license, in addition to the business license under which it is presently operating.

The pertinent Ordinances of the Municipal Code of the City of Chicago relating to this type of operation are cited herewith:

"Section 104-1. Definitions.) As used in this Ordinance: The word 'amusement' means any theatrical, dramatic, musical, . . . motion picture show. . ." "Section 104.1-2. License required.) It is unlawful for the owner or person in control of any property to produce, present or conduct "thereon or to permit any person to produce, present or conduct thereon, for gain or profit, any amusement, . . . without first having obtained a license for a public place of amusement."

"Section 1.04-1.7. Classifications.) All public places of amusement are divided into the following classes:

Class 1. Auditorium, theatre, tent or stadium provided with a screen, stage, arena, or other space . . . designed, used, or intended to be used

for the amusement or entertainment of an audience or spectators, without being limited thereto. . . ."

"Section 155.1. Permit required.) It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city, any motion picture, whether an admission fee is charged or not, without first having secured a permit therefore from the superintendent of police. . . ."

We conclude that it would be necessary for establishments specified in your letter to obtain a Public Place of Amusement License, Class I, and a permit for each film cartridge as provided for in said Ordinances, in addition to the business license under which they are presently operating.

ORGANIZATION EXEMPT FROM FEE

(City Collector—A. K.—August 22, 1968)

Your recent letter to Raymond F. Simon, Corporation Counsel, inquiring about an amusement license for the "Why? Coffee House" has been referred to the undersigned for reply. In your letter you ask our opinion "as to whether a City of Chicago Public Place of Amusement license may be issued to the YMCA for the 'Why? Coffee House' an affiliated organization * * * exempt from payment of the applicable license fee * * * *".

This matter is regulated by Chapters 101 and 104.1 of the Municipal Code of the City of Chicago. The former deals with general licensing provisions, the latter, the public places of amusement. With the exception of Section 101-13 which relates to foreign representatives, neither chapter makes provisions for the issuance of an amusement license exempt from the applicable fee.

It is our opinion, that in the absence of an express provision permitting the issuance of a Public Place of Amusement License exempt from the appropriate fee, no fee-exempt license may be issued.

REVOCATION

(Administrative Assistant to the Mayor—D. P.—August 15, 1967)

Your recent request to the Corporation Counsel for an opinion as to whether the above license may be revoked, based upon information contained in the file attached to said request, has been forwarded to the undersigned for reply.

Section 11-42-5 of the Illinois Municipal Code (Ill. Rev. Stat. 1965, Ch. 24, Par. 11-42-5) is the enabling act which delegates to the corporate authorities of each municipality the power to license certain businesses and to establish the procedures for said licensing.

Pursuant thereto, Section 101-2 of the Municipal Code of Chicago provides that the Mayor shall be the sole licensing authority for those businesses subject to licensing. Section 101-27 of the Code, which provides that the Mayor shall also have the power to revoke licenses, reads as follows:

"The Mayor shall have power to revoke any license issued under the provisions of this code for good and sufficient cause.

"If at any time after the granting of any license, any licensee shall have violated any of the provisions of this code or any of the statutes of the state in the conduct of his business, the Mayor may revoke the license therefor."

There is no requirement in the statutes of the State or the ordinances of the City that the Mayor hold a hearing prior to the revocation of any license issued by him, other than a liquor license.

In the instant case the police report indicates the following facts:

On April 28, 1967 thirteen minors were observed by policemen drinking beer and whiskey at a dance sponsored by a DePaul University fraternity. While arrests were effectuated, one officer was the victim of an aggravated battery inflicted by several patrons who were fleeing. One Phillip Ryan, and agent of the licensee, was charged with being the keeper of a disorderly house. Two other persons were charged with selling alcoholic beverages to minors and selling same without a license. Thirteen minors were also arrested.

Phillip Ryan was convicted of being the keeper of a disorderly house in a case heard in Boy's Court (Branch 43 of the Circuit Court of Cook County), the Honorable Judge Saul Epton presiding on July 19, 1967. The licensee should have exercised a greater degree of control over the activities taking place in and upon the licensed premises. It appears that sufficient cause exists upon which to base a revocation of the license in this case.

CITY THEATER LICENSE FOR THE TOWN UNDERGROUND THEATER

(City Council—E. H.—February 15, 1973)

The Illinois Appellate Court on January 16, 1973, filed an opinion affirming the judgment of the District Court with modifications.

This was an injunction suit to restrain Town Underground Theater, Inc., from operating its motion picture theater at 322 West Armitage, Chicago, without a city theater license.

Town Underground Theater contended that the ordinance was unconstitutional for the reason that the exhibition of motion pictures in theaters is a form of free speech and press protected by the First and Fourteenth Amendments and, therefore, the requirement of a license to operate motion picture theater is an invalid prior restraint on free speech.

The trial judge held that the requirement of a motion picture theater license is constitutional, but found that, because Town Underground had failed to cooperate in an investigation, and because the City did not have standardized investigating procedures, it was impossible to determine whether the persons operating Town Underground Theater were fit and proper persons to hold a theater license.

While cross-appeals were pending, the City Council in August, 1972, unanimously amended the General Licensing Provisions Ordinance (Municipal Code of Chicago, sects. 101-1 through 101-30), which governs enforcement of the Public Chauffeurs Ordinance (Municipal Code of Chicago, sects. 28.1 *et seq.*). The amendments provide for notice of the reasons for denial and for hearing, according to a definite time schedule, in the event a license application is not approved.

The Appellate Court ruled that, although it is established that expression by means of motion pictures is speech protected by the First and Fourteenth Amendments, operating a motion picture theater as an economic enterprise may be regulated and "the requirement that a license be obtained as a condition of engaging in the motion picture business is a reasonable means of insuring compliance with the police power regulations."

The ordinances leave the method and manner of investigation as to whether the applicant is a proper person to hold a license to the discretion of the administrative officers. The Appellate Court upheld this in the context of the recent amendments, saying:

> "It is a well recognized rule that courts are so wary of encroaching in any manner upon the discretionary powers of public officials that, if any

reasonable doubt exists as to the question of discretion, they will hesitate to interfere . . . However, such discretion cannot be uncontrolled and can only be exercised within limits relevant to the purpose of the ordinance."

In conclusion, the Appellate Court directed that Town Underground Theater must apply for a 1973 license and be subject to investigation as required by the present licensing ordinances. The court also ruled that the theater, which has been operating without a license while this case has been pending, must pay the license fees for 1969 through 1972, and that the City must accept these license fees.

Sec. D. OTHER LICENSES AND PERMITS

BAKERY AND BAKERY VEHICLES

(Acting City Collector—F. G. S.—February 17, 1971)

Your recent letter addressed to Mr. Richard L. Curry, Corporation Counsel, together with a copy of a letter received from Mr. G. E. Larsen, Fleet Superintendent, Ward Baking Company, 5659 South LaSalle Street, has been referred to the undersigned for attention and reply.

In your letter you request an opinion which would enable you to advise the Ward Baking Company concerning the applicability of Section 107-3 of the Municipal Code of Chicago to four specific related conditions set out in Mr. Larsen's letter to your office.

Section 107-3 of the Municipal Code of Chicago provides the following:

"107-3. No person shall conduct or operate any bakery or engage in the business of an itinerant vendor of bakery products at wholesale, *without first having obtained a license for such bakery, and for the vehicles operated in connection therewith,* or for the vehicles operated in connection with said business of itinerant vendor." (Emphasis supplied.)

In considering the conditions set out in Mr. Larsen's letter and in applying Section 107-3 of the Municipal Code to each condition, it is our opinion that:

1) Route vehicles garaged in Chicago, but not making any deliveries in Chicago require a license in compliance with Section 107-3 of the Municipal Code of Chicago;

2) Route vehicles garaged outside of Chicago that do not make any deliveries in Chicago do not require a license under the provisions of Section 107-3 of the Municipal Code of Chicago. In the event such vehicles though garaged outside Chicago and making no deliveries in Chicago should make pick-ups of bakery goods at one or more establishments owned and operated by Ward Baking Company in Chicago, they would require a license under Section 107-3 of the Municipal Code of Chicago;

3) Vehicles garaged outside of Chicago that do make a delivery or two in Chicago do require a license under Section 107-3 of the Municipal Code of Chicago;

4) Transport (Tractor-Trailer) vehicles that pick-up at a Chicago plant for bulk delivery to outlying route vehicles, but do not deliver to customers, require a license in compliance with Section 107-3 of the Municipal Code of Chicago.

It is our opinion that the vehicles operated under conditions 1, 3, and 4 of Mr. Larsen's letter require a license in compliance with Section 107-3 in that

they are vehicles operating in connection with a licensed bakery operating in the City of Chicago. Condition 2 is unclear as to whether or not the vehicles in question are in any way related in their operation in connection with the bakery licensed in Chicago. On the assumption that they are totally unrelated and are not operated in any way in connection therewith, it is our opinion as stated above that no license would be required. If on the other hand they are operated in connection therewith, i.e., they pick up bakery goods at Chicago plants for delivery outside Chicago, then such vehicles would require a license under Section 107-3 of the Municipal Code of Chicago.

BARBER SHOP LICENSE—REVOCATION

(Administrative Assistant to the Mayor—M. S. J.—July 25, 1967)

Your recent request to the Corporation Counsel for an opinion as to whether the above license may be revoked, based upon information contained in the file attached to said request, has been forwarded to the undersigned for reply.

Section 11-42-1 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, Ch. 24, par. 11-42-1) is the enabling act which delegates to the "corporate authorities of each municipality" the power to license certain businesses and to establish the procedures for said licensing.

Pursuant thereto, Section 101-2 of the Municipal Code of Chicago provides that the Mayor shall be the sole licensing authority for those businesses subject to licensing. Section 101-27 of the Code which provides that the Mayor shall also have the power to revoke licenses, reads as follows:

> "The Mayor shall have power to revoke any license issued under the provisions of this code for good and sufficient cause.
> "If at any time after the granting of any license, any licensee shall have violated any of the provisions of this code or any statutes of the state in the conduct of his business, the Mayor may revoke the license therefor."

There is no requirement in the statutes of the State or the ordinances of the City that the Mayor hold a hearing prior to the revocation of any license issued by him, other than a liquor license.

The file reveals that police officers, first having secured a warrant, searched the licensed premises and found scratch sheets and a quantity of horse wager slips and accepted bets over the telephone on the premises during their investigation. Said activities show that the licensee used the subject premises as a place of gambling, in violation of section 28-3 of the Criminal Code of Illinois (Ill. Rev. Stat. 1965, Ch. 38, par. 28-3).

In consideration of the above cited facts and law, it is our opinion that good and sufficient cause, as necessary, to revoke the barbershop license is present in this case.

BOAT TOURS

(University of Washington, Bureau of Governmental Research and Services—R. D. W.—June 26, 1969)

Your recent letter addressed to the office of the Mayor has been directed to this office for reply. You ask whether the City of Chicago licenses boat tours and whether a city admission tax is applied to any charge made to the public for such tours.

The City of Chicago does not license harbor boat tours to which the public is invited, nor does the City impose an amusement tax on admission charges. The

City does, however, issue permits with respect to the use of certain wharfing privileges. Section 38-33 of the Municipal Code of Chicago provides:

> "The port director may issue permits for wharfing privileges on the recreation section and the open wharfing section of Navy Pier to any person owning or operating a passenger excursion boat or boats. Said permits shall be subject to revocation at any time in his discretion. The permits shall be issued for a calendar year only, and the permit fee for each boat for the calendar year or any part thereof shall be based upon its passenger capacity . . . [omitting fee schedule]."

SALE OF POWER BOATS

(C. H. A.—W. J. K.—November 10, 1971)

Your letter addressed to this office wherein you state that you represent a corporation whose registered agent is in the City of Aurora and you make an inquiry if it is necessary for your client under the ordinances of the City of Chicago to obtain a retailer's license, or a broker's license for the retail sale of power boats; that some sales will be made in Chicago where the company's product is displayed but all sales would be concluded in the Aurora office.

Chapter 113 of the Municipal Code entitled "Brokers" specifically Section 113-1 defines General Brokers as follows:

> "113-1. The words "general broker" hereby defined to mean any person other than an employe of the principal for whom the business is done that negotiates, buys, sells, trades, leases, or handles for another, on a commission basis, or on the basis of compensation in proportion to the amount of the transaction, any stocks, bonds, mortgages, loans, investment securities, certificates of indebtedness, foreign exchange letters of credit, steamship transportation tickets, grain, provisions, produce, livestock, goods, wares, merchandise or any other commodity, article or property (except real property), whether similar or dissimilar to those herein mentioned, or acts through the medium of another licensed broker in the capacity and for any of the purposes aforesaid."

Your client in selling power boats at retail direct to the customer and not acting as an intermediary for or on behalf of someone else it would appear from these facts that it is not necessary for your client to obtain a broker's license.

APPLICATION OF BROKERS LICENSE FEE

(S. D. F.—K. J. S.—June 4, 1970)

In reply to your letter of May 28, 1970, Volume 25 of Opinions by the Corporation Counsel on Page 321 states:

> "It would appear from various decisions that the ordinance in question expressly declares it unlawful and prohibited to transact a brokerage business without a city license. See *Douthart* v. *Congdon,* 197 Ill. 349; *Whitfield* v. *Huling,* 50 Ill. App. 179; *Hustis* v. *Picklands,* 27 Ill. App. 270. This application is based upon transaction of business in Chicago, rather than the location of the property. *First National Bank of Willstadt* v. *Freant,* 7 Ill. App. 2d 204, 1955.
>
> The license law is not and does not purport to be, a method of taxing real estate transfers, rather by its express terms, it imposes the license on the occupation, where the transaction occurs.

It is conceivable that a broker licensed in one city, might have a series of sales of property in another municipality so that a court would regard him as one carrying on a business in the latter. However, it has been stated as a general rule that an isolated local sale by a foreign broker is not subject to a local license law, 8 Am. Jur. "Brokers", section 156.

In the light of the long line of decisions and leading texts supporting the proposition that an occasional transaction does not require a broker to obtain a license and comply with a local ordinance, it is our opinion that the present ordinance should not be applied to a person handling an occasional transaction in the City of Chicago."

LICENSING OF COLLECTION AGENCIES AND OTHERS

(Assistant Director, Legal Services Center—M. S. J.—January 12, 1968)

Your recent letter addressed to the City Attorney has been received by this office. You state that your center is making a study of several types of business enterprises with which poor people have extensive contacts, and you ask whether Chicago has ordinances dealing with the licensing or regulations of collection agencies, employment agencies, and debt adjusters and, if so, for copies thereof.

The businesses to which you refer are not subject to the regulation of or licensing by the City of Chicago. Employment agencies are licensed and regulated under authority of the State by the Illinois Department of Labor pursuant to Chapter 48, Illinois Revised Statutes, 1967. Collection agencies and debt adjusters are regulated by the Department of Financial Institutions of the State pursuant to Chapter 74, Illinois Revised Statutes, 1967.

Any further information may be secured from the office of the Illinois Attorney General, Supreme Court Building, Springfield, Illinois. 62706.

LICENSE FOR DAY CAMP

(B. L. C.—R. R.—March 1, 1973)

This is in response to your letter of February 8, 1973, requesting an opinion regarding the exemption of Eagle Day Camp, Inc. from the licensing requirements of Chapter 158 of the Municipal Code of Chicago.

As we understand your description of its operation, Eagle Day Camp does not maintain or occupy any fixed quarters. As your letter implies, Chapter 158 is in large measure concerned with the physical plant utilized by a day camp. The licensing requirements in that respect would be inapplicable to Eagle Day Camp inasmuch as there is no permanent facility.

However, your attention is directed to Sections 158-6 and 158-7 of the Municipal Code which establish additional requirements for the issuance of day care licenses. Section 158-6 provides in part:

> "In addition the City Collector shall cause the Public Vehicle Commission to make a thorough investigation of the transportation vehicle proposed to be used for the transportation of the children in the Day Care Center."

Section 158-7 provides:

> "A license may be denied or revoked for any of the following reasons:
>
> "A. Violation of any provisions of this ordinance or of the Rules, Regulations and Minimum Standards promulgated thereunder.

"B. Personnel insufficient in number or unqualified by training or experience to provide proper and adequate supervision for the number of children to be cared for.

"C. Cruelty or indifference to the welfare of a child.

"D. Conviction of the licensee, or if the applicant is a firm, partnership or association of any of its members, or if a corporation, any of its officers or directors, or of the person designated as director of the day care center, of a felony or a misdemeanor involving moral turpitude as shown by a certified copy of the record of conviction.

"E. In the case of a conviction of a misdemeanor by a court not of record, as shown by other evidence; or other satisfactory evidence that the moral character of the applicant or director of the day care center is not reputable.

It is our conclusion that Eagle Day Camp's lack of a permanent physical structure will not exempt it from the obligation of obtaining a license, for which it will be necessary to demonstrate compliance with the above-described requirements.

HAULING OF DEBRIS

(Acting City Collector—H. Z.—February 9, 1971)

We have your letter of January 7, 1971, requesting an opinion regarding license requirements for the hauling away of debris and rubbish from the site of building razing or remodeling.

The Municipal Code of Chicago specifically Sections 167-1, 3 or 123-1, clearly does not include this specific operation or operator within the meaning of Scavengers and Excavators.

It is the opinion of the Office of the Corporation Counsel of the City of Chicago that the operation in question falls within 76-6.2 and 76-6.5—Safeguards During Construction. The registration and permit for alterations, repairs, removal or demolition issued in accordance with the requirements of 42-1 and 43-1, of the Municipal Code would encompass the hauling away of the resultant debris and rubbish at ground level without requiring any other license to do such hauling, subject to supervision by the Commissioner of Buildings.

FOOD DISPENSERS LICENSE FOR CHARITABLE INSTITUTIONS

(City Collector—F. G. S.—July 24, 1970)

Your letter of July 8, 1970 addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for reply.

In your letter you request an opinion as to whether charitable, religious and educational institutions not carried on for private gain or profit, which operate eating facilities in connection with the immediate carrying out of their charitable, religious or educational activities require a City of Chicago Food Dispenser license to cover such food dispensing establishments.

The basis for your request is a letter from Mr. M. T. Tracht, Vice-President and Treasurer, Illinois Institute of Technology, copy of which you attach to your letter, in which Mr. Tracht states that the Institute has never been required to

obtain a license and suggests that if it was required to do so it would constitute "a change of policy . . ."

Section 130-16 of the Municipal Code of Chicago provides:
"It shall be unlawful for any person to engage in the business of a food dispenser, without first having obtained a license to do so. Every such license shall be posted in a conspicious place in that part of the food establishment to which the public has access."

Section 130-18 fixes the license fees to be charged and further provides that:
"A charitable, religious or educational institution not carried on for private gain or profit, which operates eating facilities in connection with the immediate carrying out of its charitable, religious or educational activities shall be exempt from the payment of the foregoing license fees."

There is no provision in Chapter 130 or any other chapter of the Municipal Code of Chicago which exempts charitable, religious, or educational institutions from obtaining a license to engage in the business of a food dispenser because it provides the service only to its faculty, staff, and students and not to the general public.

The provisions of Sections 130-16 and 130-18 of the Municipal Code of Chicago are clear and unequivocal. It is our opinion that a charitable, religious or educational institution not carried on for private gain or profit which operates eating facilities is required to obtain a license to engage in the business of a food dispenser, even though it does not serve the general public and may be exempt from the payment of license fees.

This position does not represent a change in policy. The position was stated in an opinion of the Corporation Counsel, No. 11649 dated February 18, 1953 addressed to the City Collector (Op. Corp. Coun. 335, No. 11649) and was reaffirmed in an opinion of the Corporation Counsel dated March 23, 1964 addressed to the Zoning Administrator.

DINING ROOM LICENSE— EXCEPTION FOR BAR ASSOCIATION

(General Counsel, Chicago Bar Association—A. H.—May 12, 1971)

Your recent communication concerning a proposed exemption for the Chicago Bar Association dining room from the license fees contained in Chapter 130 of the Municipal Code of Chicago has been referred to the undersigned for consideration and response.

In your letter you state that the Chicago Bar Association has continuously over a period of many years carried on an extensive and continuing program of legal education for its members and that an amendment to the by-laws has now been proposed which would reflect such educational activities which have in fact been previously carried on and are proposed to continue in the future. You ask whether under these circumstances the Chicago Bar Association dining room will qualify for an exemption from the food license fee set forth in the Code. An examination of Chapter 130, Section 130-18 reveals the following language:

"A charitable, religious or *educational institution not carried on for private gain or profit, which operates eating facilities in connection with the immediate carrying out of its* charitable, religious or *educational activities,* shall be exempt from the payment of the foregoing license fees." (Emphasis Supplied.)

Under the assumption that the Chicago Bar Association continuing legal education programs bear the necessary connection with the eating facilities provided by the Chicago Bar Association, and that the by-law suggested in your letter of March

18, 1971 is adopted by the Chicago Bar Association, it is the opinion of this office that the Chicago Bar Association dining room would qualify for the exemption to license fees hereinabove set forth.

WHO MUST OBTAIN DISPENSARY LICENSE

(City Collector—F. G. S.—June 14, 1971)

Your letter of May 17, 1971, addressed to Richard L. Curry, Corporation Counsel has been referred to the undersigned for attention and reply.

In your letter you state that "it would appear that only dispensaries or clinics which make no charge for services rendered are subject to a City Dispensary License, with the exception of government operated." You further state, "accordingly, continued issuance of Court summonses to operators of dispensaries where a charge is made because they have not obtained a City Dispensary License may appear to be interpreted as deliberate harrassment and would appear to serve no purpose."

You request an opinion which would advise the City Collector in the premises.

This is to advise you that on June 11, 1971, the City Council amended Chapter 118 of the Municipal Code of Chicago by deleting the present Section 118-1 and substituting therefore a new Section 118-1.1 and by adopting a new Section 118-1.2. The text of the two new sections is quoted below in full.

"118-1.1 For the purposes of this Chapter the following terms are defined to mean:

"Applicant"—any person making application for a license.

"Dispensary"—As used in this Chapter 'dispensary' means any place, establishment or institution which operates or is advertised or announced under the name or title of clinic, dispensary, health center, medical center, or any other word or phrase of like or similar import, for the purposes of furnishing at the place, establishment or institution advice, diagnosis, drugs, remedies, or treatment, to any person suffering from or afflicted with mental or physical disease, bodily injury, alcohol or drug addiction, not residing or confined in the place, establishment or institution."

"Owner"—In the case of a Licensee who is an individual means the Licensee, and in the case of a Firm, Partnership, or Association Licensee means each member thereof."

"Person"—Any individual, partnership, association, firm, corporation, Municipality, political subdivision, trust or estate, or any other entity whatsoever."

"118-1.2 This Chapter does not apply to, and no license provided for in this Chapter is required by:

1. A place or establishment wholly owned or operated by one or more licensed physicians and surgeons, or one or more licensed dentists, or one or more licensed chiropodists, or one or more licensed podiatrists, or one or more licensed osteopaths, or one or more licensed psychiatric social workers, or one or more licensed psychologists, and used as the office for the practice of medicine and surgery or dentistry or chiropody or podiatry or osteopathy, or psychiatric social work, or psychology, as the case may be, of such owners, regardless of the name used publicly to identify such place or establishment.

2. Hospitals licensed under Chapter 137 of the Municipal Code of Chicago, or extension facilities solely under the jurisdiction of and operated by a licensed hospital.

3. Drug Stores.

4. Pharmacies."

You will note that the word "free" does not appear in the new definition of "dispensary", in Section 118-1.1 of the Code. Therefore, Section 118-2 of the Code, with respect to license requirements, applies to all dispensaries as defined in Section 118-1.1, irrespective of whether or not a charge is made for services.

Section 118-1.2 specifies those instances in which the Chapter does not apply and where no license is required. The exceptions are limited to:

1) Certain professional persons otherwise licensed, who wholly own or operate a place or establishment and use it as the office for the practice of their particular profession.

2) Hospitals licensed under Chapter 137 of the Municipal Code or extension facilities solely under the jurisdiction of and operated by a licensed hospital.

3) Drug Stores.

4) Pharmacies.

The Amendments will take effect on and after ten days from the date of their passage and publication.

EXEMPTION FOR CHARITABLE INSTITUTIONS

(City Collector—D. J. O'B.—October 17, 1969)

This is in reply to your recent letter wherein you requested an opinion from this office as to the eligibility of the Builders' Club of Chicago to obtain a fee exempt food dispenser's license. In your letter you stated that the club in requesting a fee exempt license has relied on § 130-18 of the Municipal Code of Chicago which reads in pertinent part as follows:

"A charitable, religious or educational institution not carried on for private gain or profit which operates eating facilities in connection with the immediate carrying out of its charitable, religious or educational activities, shall be exempt from the payment of the license fees."

The Builders' Club of Chicago contends that it is a not-for-profit educational institution and that it is therefore included in this fee exemption provision.

Evidence of corporate purpose is that statement of purpose as found in the articles of incorporation. The Builders' Club of Chicago was incorporated December 26, 1895 under the name, the Building Trades Club of Chicago. The articles of incorporation state the corporate purpose to be as follows:

"The object for which it is formed is to maintain a club house furnished with all the requirements for the advancement of social enjoyment and encouragement of friendly intercourse between members thereof".

These articles were amended in July, 1898 to change the corporate name to the Builders' Club of Chicago. There has been no amendment or change of the corporate purpose since the date of incorporation.

To qualify as a fee exempt organizatioin within the meaning of the above quoted ordinance, the Builders' Club of Chicago must fulfill three expressed requirements: 1) that it be a charitable, religious, or educational institution: 2) that it not be carried on for private gain or profit: and 3) that its eating facilities be connected with the immediate carrying out of its educational activities.

The Builders' Club of Chicago asserts that it is a not-for-profit corporation. This assertion alone, however, does not meet the fee exemption requirements. There is no evidence that the corporate purpose is educational. In fact, the articles of incorporation unequivocally show the corporate purpose to be social

and fraternal. The fee exemption provision specifically refers to charitable, religious, or *educational institution*. An educational institution has been defined as a place where classes are conducted, such as schools and colleges, it is not an institution which furnished some education or instruction, as an incidental adjunct to its main purpose. (In Re Estate Goetz 218 NE 2d 483).

There is no indication, however, that the Builders' Club of Chicago engages in the organized dissemination of information or that it presents to its membership a definite curriculum, scholastic or otherwise. Furthermore, there is no indication that there exists student-teacher relationships, classroom activity or any other indicia of an institutional character. There is also no evidence that its eating facilities are connected, in any way, with educational activities.

It is, therefore, the opinion of this office that the Builders' Club of Chicago is not that type of organization which is included or which is intended to be included in the fee exemption provision of this ordinance.

EXCLUSION FOR HOSPITALS

(Commissioner of Health, Board of Health—A. H.—February 23, 1968)

Your letter addressed to Raymond F. Simon, Corporation Counsel, seeking to be advised with respect to the licensing of dispensaries under Chapter 118 of the Municipal Code of Chicago, has been referred to the undersigned for consideration and response.

After several conferences with Mrs. Bernice Hover, Chief of Bureau of Institutional Care of the Chicago Board of Health, who originated the request for an opinion, we are advised that the sole issue sought to be determined is whether a hospital, duly licensed as such by the City of Chicago, which operates a dispensary within the same building or on the same grounds for which said hospital license has been issued, must also secure a dispensary license as provided for under Chapter 118 of the Municipal Code of Chicago.

An examination of Section 118-1 reveals the specific exclusion of hospitals from the term "dispensary" for the purpose of said Chapter. Therefore, it is our opinion that no additional dispensary license need be required of hospitals which also operate dispensaries within said institution or upon the grounds for which a hospital license has already been issued.

PRIVATE DETECTIVES

(Administrative Assistant to the Mayor—H. Z.—March 2, 1972)

Your memorandum of February 16, 1972 addressed to Mr. Richard L. Curry, Corporation Counsel of the City of Chicago, concerning W. L. Lillard Security, 3613 W. Roosevelt Road, has been referred to the undersigned for reply.

The City of Chicago can institute Ordinance Enforcement Action against Willie Lillard a/k/a W.L. Lillard Security in that he has violated the provisions of Chapter 117, entitled Private Detectives and Detective Agencies, Section 117-1 of the Municipal Code of Chicago, which states:

> "No person shall advertise or hold himself out for hire as a private detective or detective agency without first obtaining a license to engage in business as a private detective or detective agency. This shall not be construed to require a person who is employed or seeks employment exclusively by a licensed detective agency to obtain such license."

Subject is also in violation of Chapter 101, entitled General Licensing Provisions, Section 101-1 of the Municipal Code of Chicago, which provides:

> "It shall be unlawful for any person to conduct, engage in, maintain, operate, carry on, or manage a business or occupation for which a license is required by any provision of this code without a license first having been procured for such business or occupation. Any person violating this section shall be fined not less than ten dollars nor more than two hundred dollars for each offense, and every day such violation continues shall constitute a separate and distinct offense."

W. L. Lillard Security cannot be held responsible for the criminal acts of its employees, acting outside the scope of their duties.

The licenses of Starlite Bowling Lanes, 834 East 87th Street, cannot be charged in this matter since it was the action of the Shopping Center Management which resulted in the employment of W. L. Lillard Security, an unlicensed agency.

LICENSING OF DOGS

(Administrative Assistant to the Mayor—W. J. K.—June 12, 1972)

We are responding to your letter of June 1, 1972 wherein you request an opinion as to the sale of dog licenses by the Police Department personnel assigned to the Chicago Animal Shelter located at 3400 South Lawndale Avenue, and the inoculation of said dogs for which a fee is to be charged.

You state that the present procedure in purchasing an unclaimed dog by a member of the public, it is necessary to obtain an inoculation for said animal from a private veterinarian before a license will issue from the City Clerk.

The pertinent sections of the Municipal Code relating to the subject matter are recited herein, to wit:

> 98-27. "It shall be unlawful for any person to own or keep a dog unless he shall procure a license therefor.
>
> 98-27.1. Application for such license shall be made to the city collector, which application shall state the name and address of the owner, the name, breed, color and sex of each dog; also the date and certificate number of dog's rabies vaccination.
>
> 98-27.2. Before a license is issued, a certificate of inoculation against rabies for each dog, issued by the county rabies inspector, or by his deputy, or by a licensed veterinarian, shall be submitted to the city clerk for examination. No license shall be issued for any dog unless such inoculation certificate bears a date within one year prior to the date of application for license. Such certificate shall be returned to the applicant after the current dog license number has been stamped thereon. When applying for a dog license by mail, a certificate of inoculation shall accompany the application. Said certificate will be returned at the time the license tag is mailed to the applicant.
>
> 98-29. The city clerk shall keep a complete registry, in a book to be kept for that purpose, of all licensed dogs, describing the same by name, breed, color, and sex, and shall also enter the name and address of the owner or keeper as given, and the number of the city license tag."

Please be advised that it will be necessary for the City Council to enact an amendment in order to allow the inoculation of dogs for a fee, and the sale of dog licenses at the Chicago Animal Shelter.

DRIVEWAY PERMIT FEES

(Alderman 46th Ward—F. G. S.—November 22, 1972)

Your letter of November 9, 1972 addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for attention and reply. In your letter you request an opinion on a series of questions related to the matter of driveway permit fees as provided for in Section 33-18 of the Municipal Code of Chicago.

It has long been an established rule of law that it is the duty of the courts to interpret a statute (ordinance) so as to promote its essential purposes and avoid construction that would raise doubts as to its validity. *People* v. *Nastasia,* 19 Ill. 2d 524, 529; *Pliakas* v. *Illinois Liquor Control Comm.,* 11 Ill. 2d 456, 459-60; *People* v. *Dale,* 406 Ill. 238.

The courts have also held that since the authority to require fees constitutes an exercise of police power, it follows that the fees charged must bear some reasonable relationship to the additional burdens and necessary expense involved in the regulation and supervision of the business affected, otherwise the ordinance imposing the fees will be regarded as a revenue measure and, being unauthorized, deemed null and void. *City of Chicago Heights* v. *Public Service Corporation,* 408 Ill. 604. However, the Court in the said case said, "A municipal ordinance is presumed valid and ordinarily, when challenged upon the theory that there is no relationship between the license fee imposed and the cost of regulation, this contention must be both alleged and proved. A license fee may, however, be so grossly excessive as to be deemed arbitrary and unreasonable as a matter of law." Whether a proposed fee would be struck down as a revenue measure would depend upon the challenger establishing that the ordinance is "arbitrary and unreasonable as a matter of law."

It is our opinion, therefore, that the fees presently charged are presumed to be valid as bearing a reasonable relationship to the burdn and expense involved in the regulation and supervision of the subject matter, namely driveways. Any contention to the contrary would have to be alleged and proved in a suit challenging said fees so imposed, or the challenger would have to prove that a fee is so excessive as to make the ordinance "arbitrary and unreasonable as a matter of law."

With respect to the question of imposition of higher fees and guidelines to be followed in increasing the fees, the same rules of law would apply, namely, the proposed fees would have to bear a relationship between the fee imposed and the additional burdens and necessary expense involved in the cost of regulation. Such an ordinance increasing fees would be presumed to be valid. A contention by a challenger that there was no relationship between the fees imposed and the cost of regulation or that the fees were so grossly excessive as to be arbitrary and unreasonable would have to be alleged and proved.

We are in no position to advise you as to whether or not the fees you propose would be legally acceptable, or what increased fees if any would be legally acceptable. This is a matter for the City Council upon due study and deliberation to determine, after it has received appropriate information, what increase in fees is justified.

May we further bring to your attention the fact that there are now two cases pending in the Circuit Court of Cook County in which the collection of the balances of unpaid driveway permit fees is raised as an issue, namely; *Napoleon* v. *City of Chicago, et al.,* 71 L 2031 and *Central National Bank as Trustee under Trust No. 15061 et al.,* v. *City of Chicago, et al.,* 71 L 5107. Both cases have been consolidated for hearing under No. 71 L 2031. The Department of Streets and Sanitation also has the matter of driveway permit fees under consideration pending the ultimate disposition of the two cases cited above. It would therefore be our suggestion that no new legislation relating to driveway

permit fees should be introduced at this time, until a decision is rendered in the two cases cited above, and until thereafter the Department of Streets and Sanitation has completed its report and recommendations in the matter.

RETROACTIVE APPLICATION OF LEGISLATION

(Commissioner, Department of Streets and Sanitation—H. N. L.—June 20, 1972)

In your letter of April 11, 1972, you requested an opinion as to the conditions under which you may require driveway permits for those driveways installed prior to the passage of the ordinance of July 28, 1913, which first required driveway permits.

In researching this question we have been unable to find any authority to support a requirement of driveway permits for driveways that existed prior to the original ordinance. On this question, the precedent appears to have been established quite long ago and has continued to remain constant, that ordinances and statutes will have prospective effect in all instances, unless there is express language to the contrary contained within the statute. Most ordinances speak from the time they go into effect, and are therefore of a prospective nature only. McQuillin on Municipal Corporations §20.69-20.70.

In *DeWolf* v. *Marshall Field & Co.*, 201 Ill. App. 542, 546 (1916) the Illinois Appellate Court discussed this question. They stated that the general presumption at law is that a statute is not intended to be retrospective in its operation unless the intention is expressly stated in its language.

It has been further held and stated in *The Barrett Manufacturing Company* v. *The City of Chicago*, 259 Ill. 578, 588 (1913) that "the intention that a statute or ordinance have retrospective operation is not to be presumed but must be manifested by clear and unequivocal language, and in case of doubt the statute or ordinance must be construed to have a prospective effect, only."

Holdings of this sort have been quite consistent and are still being followed. A more recent case holding

> "Retroactive application of legislation is not favored and as a general rule statutes are construed to operate prospectively unless the legislative intent that they be given retroactive application clearly appears from the express language of the Acts, or by necessary implication. United States Steel Credit Union v. Knight, 32 Ill. 2d 138, 204 N.E. 2d 4. A retroactive statute as defined in Corpus Juris Secundum 82, Section 412, and approved in United Steel Credit Union v. Knight, supra, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past"

was *Barrett* v. *Guaranty Bank & Trust Co.*, 123 Ill. App. 2d 326, 332-333 (1970).

In examining the ordinance in question no express language to enable it to be held as retrospective can be found, and in fact there is language in the ordinance that would indicate the intention was for it to have prospective operation only. In Section 1, in the first sentence the ordinance reads in part, ". . . shall hereafter construct, build, establish, or maintain driveways. . . ." The use of the words "shall hereafter" by themselves is strong evidence that the ordinance was meant to be prospective only. Then in Section 8, to conclude the ordinance, it reads, "This ordinance shall be in force and effect from and after its passage, approval and publication," which only goes to stress the prospective intention behind this ordinance. Therefore, from the language of the ordinance and the case law in Illinois, it appears that you cannot apply the ordinance to those driveways that were in existence prior to its passage and cannot require owners of such driveways to obtain driveway permits.

ENGINEERS—OUT OF STATE

(Director of Environmental Control, Fire Engineers Incorporated—F. G. S.—October 10, 1969)

We have your letter of August 21, 1969 in which you ask whether plans and specifications prepared by your professional engineer, registered only in Minnesota, and submitted pursuant to Section 17-48 of the Municipal Code of Chicago would comply with the provisions of Section 17-50 of the Municipal Code of Chicago, if the plans are approved by and have the seal of a Registered Professional Engineer registered in the State of Illinois. Our answer is in the affirmative.

For your information, Section 16 of the Illinois Professional Engineering Act (Ill. Rev. Stat. 1967, Ch. 48½ Par. 47), of which your professional engineer may wish to avail himself, provides for the registration of practitioners of other states, territories or possessions.

INCIDENTAL EXCAVATING

(City Collector—W. M. Z.—January 9, 1969)

Please refer to your communication of December 26, 1968, wherein you request our opinion as to "whether a person whose principal business is the installation of plumbing or that of building sewers is required to obtain an Excavator's license to cover his excavating operations incidental to the plumbing and sewer pipe installation or sewer building. It being understood that the incidental operations are performed by the said installer of the plumbing or the sewer builder and not by a person primarily engaged in the business of excavating."

We have carefully examined the ordinance involved and have discussed this matter with the numerous departments. It is our opinion that excavating is a separate and distinct profession and should not be confused with plumbing and drain layers or sewer pipe installers. At the present time plumbers and drain layers and sewer installers are licensed by separate city departments.

It is, therefore, our opinion that where a person is engaged in plumbing or building sewers as his principal business and not in excavation, he does not need an excavator's license.

FIREWORKS DISPLAY PERMIT FEE

(Director In Charge, Bureau of Fire Prevention, Chicago Fire Department—M. J. P.—April 4, 1973)

Your letter of March 23, 1973, addressed to the Honorable Richard L. Curry, Corporation Counsel of the City of Chicago, requesting an opinion as to whether the New Melrose Fireworks Company should pay only one $25.00 permit fee for the entire baseball season, has been referred to the undersigned for reply.

Chapter 125-31 of the Municipal Code of Chicago provides:

"The permit fee for each display on public or private property, shall be twenty five dollars."

The issue presented by the application of this section of the Municipal Code of Chicago to the instant fact situation is what constitutes "each display" which requires a twenty five dollar fee. The answer to this issue can be found by construing the ordinance in such a manner as to give it a clear and logical meaning

rather than any other construction which would tend to make its provisions illogical and useless. The clear and logical meaning of "each display" is just that, each individual display or exhibition.

Therefore, applying the law to this fact situation, it is our opinion that the Melrose Fireworks Company must pay one $25.00 permit fee for each day on which there is an individual fireworks display or exhibition.

PUBLIC GARAGE LICENSE FOR CARL SANDBURG VILLAGE

(Commissioner, Department of Development and Planning—A. H.—April 24, 1968)

We are in receipt of a request from the City Collector for an opinion with respect to whether the management of Carl Sandburg Village should be granted a Public Garage license in view of the fact that said garage would be located within 200 feet of the First St. Paul's Lutheran Church located at 1301 N. LaSalle Street in apparent violation of Chapter 156, Section 156-18 of the Municipal Code of Chicago.

We are advised that the application for said Public Garage license was approved by the Zoning Administrator, Department of Buildings, and the Bureau of Fire Prevention; however, the Police Department disapproved the application by reason of Section 156-18 aforesaid.

Since Carl Sandburg Village is a Planned Development project, wherein proposed uses of said property are handled on a project rather than zoning district basis, would you please advise this office as to whether the public garage at 1255 and 1355 N. Sandburg Terrace was or is contemplated by the Planned Development approved by the City Council; whether said garages are in fulfillment of the off-street parking requirements of the Planned Development project; and such zoning considerations, if any, that would warrant the issuance of a Public Garage license in view of Section 156-18.

LAUNDRY LICENSE—HOSPITAL EXCEPTION

(City Collector's Office—M. J. P.—June 18, 1973)

Your letter of May 21, 1973, addressed to the Honorable Richard L. Curry, Corporation Counsel of the City of Chicago, has been referred to the undersigned for reply. In your letter, you request an opinion as to whether Hospital Laundry Services Inc. is required to have a license to operate its laundry facilities, based upon the information contained in the letter attached to your request.

The letter attached to your request indicates that Hospital Laundry Services Inc. is a not-for-profit corporation organized under the General Not-For-Profit Corporation Act of the State of Illinois. It performs laundry services only for its member hospitals, each of which is a not-for-profit corporation. None of the hospitals for which Hospital Laundry Services Inc, performs laundry services, makes a separate charge to its patients. The member hospitals own and operate Hospital Laundry Services Inc. as a co-operative. The fee is paid only for those expenses, which would also have to be paid, if the laundry was within the hospital itself.

In connection with this fact situation Chapter 145, Section 1, Paragraph 3, of the Municipal Code defines the word "laundry" in part:

> "shall also be held to include any private laundry maintained or operated in connection with any hotel, restaurant, or public institution, except a hospital or charitable institution where no charge is made for laundry services."

Since Hospital Laundry Services falls within the exception as a private laundry operated in connection with a hospital or hospitals where no charge is made for laundry services, it is the opinion of the undersigned that the Hospital Laundry Services, Inc., is not a "laundry" within the definition of the Municipal Code of Chicago and therefore, is not required to have a license to operate.

MOBILE CORONARY CARE UNIT

(Commisioner, Board of Health—F. G. S.—April 17, 1973)

Your letter of March 16, 1973 addressed to Richard L. Curry, Corporation Counsel has been referred to the undersigned for attention and reply. With your letter you enclosed a copy of a letter dated March 13, 1973 addressed to Dr. Eric Oldberg, President, Chicago Board of Health from Mrs. Carolyn York, R.N., Supervisor ICCU, Edgewater Hospital together with other explanatory documents. Mrs. York's letter requested approval and certification for the Edgewater Hospital Mobile Coronary Care Unit and personnel. Your letter requests our opinion as to whether Edgewater Hospital's Mobile Coronary Care Unit is an extension of their hospital service; whether this service requires an ambulance license under present city codes and if additional legislation is required to cover this situation.

Chapter 103 of the Municipal Code of Chicago, Section 103-1(a) defines the term ambulance. Section 103-2 contains the requirements with respect to licensing. Applying both Sections of the Municipal Code of Chicago to the circumstances you describe with respect to the Edgewater Hospital Mobile Coronary Care Unit, it is our opinion that it comes within the definition of an ambulance in Section 103-1(a) of the Municipal Code, and further requires a license as an ambulance under Section 103-2 of the Municipal Code.

With respect to the Edgewater Hospital's use of the Ambulance as a Mobile Coronary Care Unit, we call your attention to the fact that the provisions of Chapter 111½, para. 86.3 et seq. (Ill. Rev. Stats. 1971) require that a hospital have approval by the Illinois Department of Public Health to "Conduct pilot programs utilizing mobile intensive care personnel for the delivery of emergency medical care to the sick and injured at the scene of an emergency and during transport to a hospital. . .". A copy of Chapter 111½, paragraphs 86.3 through 87 (Ill. Rev. Stats. 1971) is herewith enclosed for your information.

With respect to your inquiry as to whether additional legislation is required our answer is in the negative insofar as the licensing of the vehicle as an ambulance is concerned.

CERTIFICATE OF FITNESS FOR LAUNDRY ATTENDANTS

(Superintendent of Police—A. H.—January 5, 1968)

Your recent request for an interpretation of a provision in Chapter 145, Section 145-24.3 of the Municipal Code of Chicago, addressed to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response.

The specific language which you desire to be interpreted requires attendants in coin-operated laundries to be holders of Certificates of Fitness and you ask whether the owners of a coin-operated laundry is also required to be the holder of such a Certificate in order to act as an attendant in his own establishment.

Nothing within Chapter 145 of the Municipal Code of Chicago, nor within Chapter 101 thereof, which contains the General Licensing Provisions with respect to all businesses required to be licensed in the City of Chicago including coin-operated laundries, requires the owner of said business to secure a Certificate of Fitness in order to act as his own attendant. It should be noted Sections 101-4

and 101-5 of the Code contain available procedures and authorization for the City Collector to secure essentially the same information from the owner as that required from applicants for Certificates of Fitness as set forth in Section 145-24.3.

Further, the license fee required for the operation of coin-operated laundries in part relates to the necessary processing and investigations of applications for such business licenses as contemplated in Sections 101-4 and 101-5 of the Municipal Code, as does the Certificate fee in the case of attendants in Section 145-24.3. To require an owner to submit to two separate procesedures and investigations having substantially similar objectives, and exact from him two licensing fees therefor, would, in our opinion, place the legality of said ordinance provisions in jeopardy.

It may be assumed that the City Council contemplated that owners of self-service, coin-operated laundries, who in all likelihood would be on the premises during most of the business day, would have a sufficient interest in preserving their property and businesses, and thereby fulfill the correlative public interest as indicated in the standards required for attendants, so as to meet the essential requirements of Section 145-24.3, without making said requirements specific, as contrasted with a person who would be merely employed as an attendant and therefore have a lessor interest in said business and property than an owner.

Therefore, it is our opinion that the owner of a coin-operated laundry need not also be the holder of a Certificate of Fitness in order to act as an attendant in this own establishment.

LICENSING—GENERAL SCOPE

(City Comptroller, City of Seattle—R. N. K.—October 4, 1968)

Your recent letter addressed to the City Clerk of Chicago, has been referred to the office of the Corporation Counsel and to the undersigned for response. In your letter, you raise six questions with respect to the licensing provisions of the City of Chicago. We are setting forth below the questions and our answer with respect to each of them.

(1) What is the general scope of your city's license ordinance?

The City of Chicago derives direct authority to license from the Municipal Code of Illinois (Ill. Rev. Stat., 1967, Ch. 24). Sections 11-42-1 through 11-42-11 of said Chapter list various businesses which may be licensed by a municipality. In addition, the City of Chicago is given the power to regulate other businesses through the police powers granted to it in various other stautory provisions. From this power to regulate the City of Chicago is given the implied power to license the regulated businesses. *City of Chicago* v. *Michalowski,* 318 Ill. App. 533 (1943).

(2) Do you license for regulation and/or revenue?

In Illinois, a municipality has no power to impose a license fee solely for the purpose of raising revenue, *Aberdeen Franklin Coal Co.* v. *City of Chicago,* 315 Ill. 99 (1925). However, the power to impose a license fee is implied from the power to regulate, *American Baking Co.* v. *City of Wilmington,* 370 Ill. 400 (1939).

(3) Are the license provisions part of the same code or separate ordinances?

Licensing provisions are found in various chapters of the Municipal Code of Chicago. General licensing provisions are found in Chapter 101 of said code.

(4) Are licenses transferable or assignable from one legal entity to another?

The Municipal Code of Chicago, Chapter 101, section 101-18, provides that where the transfer is not otherwise prohibited, any person to whom any license shall have been issued may, with the permission of the Mayor, assign and transfer

the same to any other person of approved character and qualifications. However, not more than one transfer of ownership shall be allowed on any license.

(5) What penalties are provided for failure to comply?

Section 101-27 of Chapter 101 provides that, if at any time after the granting of any license, any licensee shall have violated any of the provisions of the Municipal Code of Chicago or any of the statutes of the State in the conduct of his business, the Mayor may revoke the license therefor. Section 101-30 provides that any person violating any of the general licensing provisions, where no other penalty is specifically provided, shall be fined not more than two hundred dollars for each offense.

(6) Have you found it expedient to supplement various ordinances with rules and regulations?

Certain licensing provisions have been supplemented by rules and regulations, where, for example, technology constantly changes standards, which must be reflected through some appropriate means in order to effect meaningful regulation. Among such ordinances would be those involving the Board of Health, the Department of Buildings, the Department of Air Pollution Control and others.

"MACHINE SHOP" DEFINED—LICENSING

(City Collector—F. G. S.—June 10, 1970)

Your letter of May 11, 1970 addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for reply. In your letter you request an opinion as to whether a "workshop which is engaged in the business of sharpening industrial saws and knives, and as such, grinds these items for the purpose of sharpening these instruments and tools may be considered within the purview of Section 150-18 of the Municipal Code of Chicago and subject to the Machine Shop License provisions of Section 150-19 of the Municipal Code of Chicago".

Ch. 24 Section 11-42-8, Illinois Revised Statutes 1969, provides the authority by which the City of Chicago may license "machine shops".

Pursuant to the above cited statutory authority, Section 150-19 of the Municipal Code of Chicago provides as follows:

> "No person shall conduct or operate a machine shop within the limits of the city without having first obtained a license therefor; provided, however, that this shall not apply to any class of machine shops specifically licensed under other provisions of this code."

Section 150-18 of the Municipal Code of Chicago defines the term "machine shop" as follows:

> "The term 'machine shop' is hereby defined to mean a workshop in which machines are made or metal parts thereof are repaired, or where parts of machines, or tools, implements, gears, dies, screws, or other metal articles are cut, filed, shaped, punched, stamped, or repaired by means of a lathe or other machinery."

It is our opinion that "industrial saws and knives" in their inherent nature may be considered "tools, implements . . . or metal articles", within the purview of Section 150-18 and furthermore, the act of grinding "industrial saws and knives" for the purpose of sharpening same, places the operation within the meaning of Section 150-18, in that said articles are by virtue of this process either "cut, filed, shaped, . . . or repaired by means of . . . machinery".

A careful review of the Illinois Statutes discloses no specific definition of machine shop, nor any exclusion of the specific type or class of machine shop referred to above. The Municipal Code of Chicago does not provide for the licensing of this class of machine shop under any other provisions of the Code.

It is, therefore, our opinion that said operation falls within the purview of the definition of a machine shop under Section 150-18 of the Municipal Code of Chicago and therefore requires a license as provided for under Section 150-18 of the Municipal Code.

MORTGAGE LICENSE

(J. J. B.—W. J. K.—November 18, 1970)

Your inquiry as to whether or not your client is required to have a license or permit who intends "opening up offices within the City of Chicago" * * * "to engage in the residential mortgage origination business" was given to the undersigned for reply.

Chapter 113 of the Municipal Code of Chicago entitled "BROKERS" specifically Section 113-1 defines a general broker and includes therein anyone who deals in transaction of any stocks, bonds, mortgages, loans, etc.

Section 113-2 makes it unlawful to engage in the business of a general broker without first having obtained a license to do so.

Section 113-5 provides for an annual fee of $25.00, for a general brokers license.

LICENSING OF MOTION PICTURES

(Corporation Counsel, City of Indianapolis—R. F. F.—July 7, 1971)

This is in response to your letter of June 21, 1971, inquiring about our motion picture ordinance.

I have attached a copy of our ordinance. You will note that it provides for licensing of films intended to be shown to children (persons under 18 years of age), but that films shown for adults only may be exhibited without submission for licensing. Although such adult films do not come within the purview of the licensing system, they nevertheless are subject to the criminal sanctions of the State of Illinois obscenity laws.

An earlier motion picture ordinance was held invalid by the United States Supreme Court because it did not provide a rapid court review of the City's decision to deny a license. *Teitel* v. *Cusack,* 390 U. S. 139 (1968). The ordinance has since been amended to provide an administrative review of the denial of a license by the Motion Picture Appeal Board within seven days of such denial, and a court test of the Appeal Board decision within three days of its decision. (At the same time, the ordinance was also amended to remove the licensing requirement from "adults only" films.) The ordinance, as amended, has been upheld. *Universal Film Exchanges, Inc.* v. *Chicago,* 288 F.Supp. 286 (1968).

The licensing system has worked well and has achieved its desired goal. At present the designates of the Superintendent of Police deny permits for two to four films a month out of all they see. In the majority of cases, the distributor accepts the decision of the Superintendent. In the past three years distributors have contested in court the decision of the Motion Picture Appeal Board on four occasions. The City was successful in each case.

CHICAGO INTERNATIONAL FILM FESTIVAL

(Festival Director—M. E. A.—October 24, 1968)

In regard to our conference at my office last week concerning the applicability of the Chicago Motion Picture Ordinance to the Film Festival, I have discussed your plans for the 4th Chicago International Film Festival with Raymond F. Simon, Corporation Counsel of the City of Chicago.

Mr. Simon and other City officials share the view which I communicated to you at our office to the effect that the City of Chicago wishes your Festival the greatest success and will do everything within the law to promptly accommodate you as to the licensing of any films you may wish to show to the general public.

It is my understanding that you have only 3 programs which could fall under the Motion Picture Ordinance:

(1) feature films,

(2) short subjects, and

(3) student films.

Since you will be showing the feature films and those short subjects which might fall within the Ordinance to audiences restricted to persons 18 years of age and over, there is no problem as to the first two categories. You do not need to license films for these showings.

However, as far as student films are concerned, it is our understanding that you wish to show them to audiences including students who are 17 years of age or under. Therefore, licenses for the showing of these films are required under the Chicago Motion Picture Ordinance.

The exhibition of these student films will be on Saturday, November 9, 1968 between 1 and 4 P.M. and again on Sunday, November 10, 1968 between 1 and and 4 P.M. We have instructed the Film Review Section of the Chicago Police Department to cooperate with you in licensing these films in every manner possible. Toward this end, the Film Review Section will screen your student films immediately upon receipt, giving them preference for immediate screening over all other films.

Also, should you desire, we will convene the Film Review Section at 8:30 A.M. on Saturday, November 9, 1968 so that the Film Review Section can screen and arrange for the licensing of your entire 3-hour program on the very morning of the day of your first performance. Because of our sincere desire that the 4th International Film Festival be a success, we will be happy to do this even though it will mean convening the Film Review Section on what normally is a non-working day.

Kindly advise me at your earliest convenience, if you wish for us to convene the Film Review Section on Saturday, November 9, 1968 at 8:30 A.M. in order that we might make the appropriate arrangements to do so.

VEHICLE STICKER REQUIRED FOR RESIDENTS

(C. F.—D. P.—November 1, 1967)

Mayor Richard J. Daley has directed this office to consider your recent letter inquiring whether you must purchase a Chicago motor vehicle sticker for a fifteen-day leave you plan to spend in this city.

Regretfully, we must inform you that all residents of Chicago must pay the fee for whatever period of time they will use the vehicle in the city. It is

the status of being a resident rather than the time the vehicle is used that determines whether or not the sticker must be purchased.

As you know, under federal law, military personnel do not lose their established residence for purposes of taxation, among other things, merely because they are ordered to another location (50 U.S.C.A.App. § 574). This means, of course, that once a motor vehicle fee is paid in the city of residence (in your case Chicago), it need not be paid in any other community to which the serviceman is ordered.

MUSEUM OF SCIENCE AND INDUSTRY

(City Comptroller—S. R. D.—May 16, 1968)

In accordance with a recent conversation between Mr. Watrous and the undersigned, we are enclosing herewith the above warrant for the year 1967.

The Museum of Science and Industry is a charitable and educational institution located in Jackson Park, Chicago, Illinois, and exempt from inspection fees as provided by Section 46-7 of the Municipal Code of Chicago. Therefore, all present and future warrants covering elevator inspection, sign inspection, boiler inspection, refrigeration inspection, mechanical ventilation inspection, air pollution inspection and the driveway permit fee should be waived. Also, all warrants pertaining thereto should be cancelled.

REGULATION OF NEWSPAPER STANDS

(Commissioner of Streets and Sanitation—M. F. B.—September 28, 1967)

This is in reply to your letter dated August 4, 1967 requesting an opinion whether Newsstands selling "Out of Town Newspapers" require a permit to operate under Sections 34.10 through 34.13 inclusive, of the Municipal Code.

Section 34.8 states as follows:

"It shall be unlawful for any person to erect, locate, construct or maintain any Newspaper Stand on any public way or any public place without obtaining a permit therefore from the Commissioner of Streets and Sanitation as hereinafter provided."

Any newsstand located at a public way or public place is subject to regulation by the City of Chicago. The sale and display of any newspapers on a newsstand without a permit violates the provisions of Section 34.12 of the Municipal Code of the City of Chicago and is illegal. The Department of Streets and Sanitation can therefore take the appropriate action to compel their removal.

PHOTOGRAPHER'S LICENSE—REQUIREMENTS

(Administrative Assistant to the Mayor—W. J. K.—June 18, 1970)

Your request for an opinion relating to attached police report dated April 7, 1970 which recommends the disapproval of an application for a Photographer's License, specifically paragraph 4 of said report, has been referred to me for reply.

Paragraph 4 of said report reads as follows:

"In reviewing the City Code for the requirements of a Photographers License, there was a question if this location would meet the qualifications

of Chapter 161-8 (Sanitary Requirements). A request was made of the Corporation Counsel via License Headquarters if the above intended operation would qualify. The reporting officer was advised that to qualify this would have to be a fixed location with a fixed office and place where work is done."

The attached police report further states that an application for a Photographer's License for premises described as 1425 N. Wells Street was assigned to the license unit for investigation; that 1425 N. Wells Street is a vacant lot used for parking by Sanders Display Co. who conduct their business at 1427-31 N. Wells Street, adjacent to the north of said parking lot; that adjacent and to the south of said parking lot is the Pickle Barrel Restaurant at 1423 N. Wells Street. The investigating officer was informed by the applicants "that they will have a portable booth * * * * keep in their auto and set up in the lot at night. This booth will have a front panel and two side panels being four feet square and eight feet high. The front panel will have a single hole * * * * customers will put their head in and have a polaroid snapshot taken. This photo will then be pressed onto a button to be worn on the lapel."

Sections 161-3 and 16-8 of the Municipal Code of Chicago provides as follows:

"161-3. An application for a license under this chapter shall be made in conformity with the general requirements of this code relating to applications for licenses. In addition, the applicant shall state the place at which it is desired or intended to carry on the business of photographer, giving a description of the premises, as well as the location of the same."

"161-8. Every building, place, or establishment in which the business of a photographer is carried on shall be kept in a clean and sanitary condition. * * * *"

It appears from these Sections that the City Council for all intents and purposes has intended that a photographer shall conduct his business in a permanent structure and at a specified location. It is the opinion of this office that the applicants for said license for premises located at 1425 N. Wells Street (a vacant lot) are not in compliance with the ordinances as herein above recited and the license officer rightfully recommended the disapproval of the application.

REGISTRATION OF CHICAGO PLUMBING CONTRACTORS

(Board of Examiner Plumbers—R. L. C.—March 14, 1968)

Your recent letter directs our attention to the Illinois Plumbing Contractors' Certification Law (Chapter 111½, Section 116.201 et seq., Ill. Rev. Stat. 1967) which was passed by the 75th General Assembly and signed into law on August 26, 1967, and you ask our opinion as to the effect of this new law upon Chicago plumbing contractors who are registered under the provisions of Chapter 162.1 of the Municipal Code.

Section 16 of the new State law provides an exemption for registered Chicago plumbing contractors by stating:

"If the provisions of this Act as to indemnification bonds and compliance with the minimum code of standards published by the Department are met as a minimum, then this Act shall not apply in any municipality having a population of 500,000 or more which provides for the certification of plumbing contractors".

Inasmuch as the bond requirements of both the State Act (Section 6) and the Municipal Code (Chapter 162.1, Section 3) are identical ($20,000.) and the

provisions of the Chicago Plumbing Code uniformly higher than the State, the conditions for exemption seem to be fully complied with.

There is no language in either the new State law or the City Code which contemplates a reciprocal credit for registration elsewhere. Therefore, Chicago contractors will require certification by the State for out of city work and conversely out of city contractors will be required to be registered as plumbing contractors under the Chicago Code when they attempt to "engage in the business of installing plumbing" within the City of Chicago.

A fair reading of the applicable provisions of both the Act and the Chicago Code compels this interpretation despite the fact that it may cause a duplication of bonds and registration fees for contractors working both within and without Chicago.

CONSTITUTIONALITY OF PLUMBING ORDINANCE

(Secretary, Board of Examiners of Plumbers—G .F. H.—October 20, 1971)

In response to your inquiry of October 15, 1971, regarding the constitutionality of Chapter 162 of The Municipal Code of Chicago, it is the opinion of the Corporation Counsel that Chapter 162 is constitutional and that no amendments are necessary.

Chapter 162 was enacted pursuant to Section 116.50 of the Illinois Plumbing License Law (Ill. Rev. Stat., ch. 111½, par. 116.50). As required by that section, the Chicago Plumbers Ordinance is substantially the same as the State Plumbing License Law.

Chapter 162 contains no provisions similar to those in the Illinois Plumbing Contractor's Certification Act (Ill. Rev. Stat. 1967, ch. 111½, pars. 116.201-.217) which was declared unconstitutional by the Illinois Supreme Court in *People* v. *Masters,* No. 43002.

Thus, the invalidity of the State Certification Act has no relationship to the continuing validity of the Chicago Plumbers Ordinance.

EXAMINATION FOR PLUMBER'S LICENSE

(Secretary, Board of Examiners of Plumbers—F. G. S.—June 15, 1972)

Your letter of May 18, 1972, addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for attention and reply. You request an opinion regarding the legality of a proposed procedure for grading answers to examination questions by applicants for a City of Chicago Plumber's license. With your letter you enclosed a sample sheet of the questions to be asked and a bound copy of the pertinant sections of the Municipal Code of Chicago relating to Plumbing which each person would be allowed to use as a reference when taking the examination.

The sample questions submitted by you were of the multiple choice type. In addition to requiring a substantive answer on each question, the applicant was required to cite the Chapter and Section of the Municipal Code which supported his answer. According to your proposed procedure, if the applicant gave the correct substantive answer but cited the wrong Chapter and Section of the Municipal Code, the entire answer would be marked wrong.

It is our opinion that the method you are proposing, namely, grading a two-part answer entirely incorrect where the substantive part of the answer is correct but the code reference for the answer to the question is incorrectly cited, would not withstand a challenge as to its legality.

It must be assumed that the purpose of the examination is to test the applicant's knowledge of the plumbing requirements contained in the Municipal Code and not merely his ability to state the Chapter and Section of the Municipal Code where the correct answer can be found.

It would be our further opinion that the procedure which should be followed, if the examiners believe that it is essential that the applicant be able to cite the Section of the Municipal Code that contains the particular requirement, would be either to separate the items into separate questions and apply a grade value to each question that reflects its relative importance in the examinations or if you retain both parts in a single question allocate a portion of the grade for the question to each part of the question.

It is our opinion that your proposed grading of the examination which would grade the applicant's answer as wrong where he gave the correct substantive answer but the wrong code citation to support the correct answer, cannot be considered a legal and valid method of grading the applicant's qualifications for a Plumber's license.

We have discussed this matter with Dr. Charles A. Pounian, Personnel Director, Executive Secretary and Chief Examiner of the Chicago Civil Service Commission to get his judgment of the proposed grading method and would like to suggest that your Board of Examiners secure his advice and assistance in setting up the examination and the grading method.

RE-ISSUANCE OF PLUMBER'S LICENSE

(Secretary, Board of Examiners—R. L. C.—January 24, 1969)

Your letter of January 23, 1969 requests an opinion as to the issuance or reissuance of a plumber's license to Mr. Samuel Hackin without examination and without the payment of fees.

The facts which you recite inform us that Mr. Hackin was issued a Master Plumber's License in 1944 which was annually renewed through 1958. Since 1958, Mr. Hackin alleges that he was engaged in the plumbing business and licensed by the State of Arizona. He now asks for the "reissuance of his plumber's license without examination or without paying the fees which would have been required since 1958 to keep his license in force."

Section 162-8 of the Municipal Code of Chicago reads, in part, as follows:

> ". . . A license which has expired for failure to pay the anuual fee shall be reinstated by the Board, without examination, upon payment of a lapsed renewal fee in addition to the annual license fee within five years following the date of expiration."

Inasmuch as five years has passed since Mr. Hackin's license expired, he is clearly not within the contemplation of this provision.

Section 162-10 provides:

> "Any person who has been licensed by another state as a Master Plumber, Journeyman Plumber or the equivalent thereof may apply for a plumber's license under this ordinance. The Board shall issue such license, without examination, upon payment of the fee for the license certificate and the annual license fee provided herein if the educational or experience requirements for the issuance of the license by such other state are at least the equivalent of the requirements on this ordinance."

In order for Mr. Hackin to qualify for a license, without examination, under this language, it will be necessary for your office to ascertain—

(1) that Mr. Hackin was, in fact, licensed by the State of Arizona "as a Master Plumber, Journeyman Plumber or the equivalent" and

(2) satisfy yourself that "the educational or experience requirements for the issuance of the license by . . . . . (Arizona) are at least the equivalent of the requirements on this ordinance."

Unless both of these conditions are found to exist, you will be without authority to grant Mr. Hackin a plumber's license without examination.

One further point, there appears to be no ordinance support for your position that he pay "the fees which would have been required since 1958 to keep his license in force." Section 8 quoted above calls for "payment of a lapsed renewal fee" which is set at $15.00 by reason of the provisions contained in Section 162-18 (3).

REVOCATION OF LICENSE

(Administrative Assistant to the Mayor—A. H.—November 6, 1967)

You have asked whether premises for which a non-liquor license has been revoked must stay vacant for a year as in the case of premises for which a liquor license has been revoked.

Presumably your question has reference to Paragraph 156 of Chapter 43, containing provisions of the Illinois Liquor Control Act (Ill. Rev. Stat. 1965, ch. 43, par. 156), which provides that no license shall be granted for the conduct of the business of manufacturing, distributing or selling alcoholic liquor for one year in premises for which a liquor license has been revoked for cause.

The provision to which you refer does not apply to non-liquor licenses. It should be noted, further, that said premises need not stay vacant for the year, but may not receive a liquor license for that period of time under the language of the statute.

PRO-RATA REFUND OF LICENSE FEES

(City Collector—A. F. K.—May 28, 1968)

Please be advised that your letter to Raymond F. Simon, dated May 9, 1968 requesting an opinion setting forth the policy of the City with respect to the pro-rata refund of license fees has been referred to the undersigned for reply. In your letter you ask "the policy of the City with respect to the granting of pro-rata refunds of fees paid for licenses where the businesses or premises were destroyed during the recent civil disturbances and where the persons thus affected do not desire to engage in such business at a different location during the license period."

The controlling provision, cited in your inquiry, is Section 101-12 of the Municipal Code of Chicago.

> "In no event shall any rebate or refund be made of any license fee or part thereof by reason of the death of the licensee or by reason of non-use of such license, or by reason of a change of location or occupation of such license. . ."

It is a long established principal of municipal law that where a person, in the absence of fraud or mistake of facts pays money to the proper municipal officer for a license, voluntarily, without compulsion or duress and not under protest, he cannot recover it back. The amount paid as a license fee is for a whole period and in the absence of express provisions to the contrary, the City is without authority to make refunds for the unused portions. For this purpose, there is no distinction between licensees who are unable to continue their business for the duration of the license period and those who are unwilling to do so.

In this instance, there being no express provision for pro-rata refunds of license fees, no refunds may be made.

Citations: Code—Chapter 101, §101-12

Cases: Arms vs Chicago, 251 Ill. App. 532 (1929)

Other references: 3 Op. Corp. Coun., p. 6 (unnumbered)
19 Op. Corp. Coun., p. 183 (9025)
19 Op. Corp. Coun., p. 178 (9082)
19 Op. Corp. Coun., p. 180 (9400)

REGULATION ON TRUCKS WITH TRAILERS

(Superintendent of Police—S. S.—June 3, 1968)

Reference is made to your letter of May 20, 1968, in which you request that we clarify an apparent conflict between S.B. No. 1211 and H.B. No. 1602 (Ill. Rev. Stat. 1967, ch. 95½, sec. 224) passed at the last session of the Illinois General Assembly.

S.B. No. 1211, passed on June 22, 1967, provides that a truck tractor with semi-trailer drawing one trailer, loaded or unloaded, or a tractor and a stinger-steered semi-trailer, or any combination specially designed to transport motor vehicles may have a length of not to exceed 65 feet over-all when operating on any four-lane highway. Whereas, H.B. 1602, passed June 20, 1967, provides 60 feet over-all maximum.

Illinois law provides that two acts passed at the same session of the legislature are not to be construed as inconsistent, if it is possible to construe them otherwise; but when it is impossible to give effect to both acts, the one passed later in point of time will control. *People* v. *Mattes,* 396 Ill. 348 (1947); *Buchsbaum & Co.* v. *Gordon,* 389 Ill. 493 (1945); *People* v. *Village of Oak Park,* 372 Ill. 488 (1939); *People* v. *B.&O. S.W. R.R. Co.,* 366 Ill. 318 (1937).

Consequently, to the extent that S.B. No. 1211 and H.B. No. 1602 are inconsistent, S.B. No. 1211, since it was passed by the Legislature two days later than H.B. No. 1602, will control. For this reason, the 65 foot maximum provided for in S.B. No. 1211 controls as to the length for the above-described vehicle as set forth in Ill. Rev. Stat. 1967, ch. 95½, sec. 224 .

SUSPENSION OF UNDERTAKER'S LICENSE

(Administrative Assistant to Mayor—P. M. S.—January 15, 1970)

We have your request for an opinion regarding a judgment obtained against Wesley Lewis, d/b/a Wesley Funeral Chapel. The copy of letter attached to your request from Attorney Burton L. Hoffman, states that he represents two clients who have obtained a judgment against Mr. Wesley. The attorney further states that this judgment was for personal injuries caused by the negligence of an employee of Mr. Wesley in the operation of a motor vehicle. The attorney points out that although there are avenues open to him to collect this judgment, he desires to know what action the City of Chicago intends to take in this situation.

Section 181-9 of the Municipal Code of Chicago, provides as follows:

"Any license issued under this chapter may be suspended by the board of health for a period not to exceed 30 days, and said license may be revoked at any time after the issuance thereof by the mayor, in addition to any other penalty hereinafter imposed by this chapter, for a violation of any of the provisions of this code or any law relating to such occupation or rule or regulation of the board of health."

Based upon the above quoted ordinance, it is our opinion that an undertaker's license cannot be suspended or revoked for failure to satisfy a judgment obtained as the result of a motor vehicle accident.

Section 181-2.1 of the Municipal Code of Chicago, pertaining to the qualifications for issuance of an undertaker's license, provides in part as follows:

> "Said applicant shall further furnish to the said board [board of health] evidence that . . . he is of good moral character and a fit person to be licensed as an undertaker."

When this licensee applies for renewal of his undertaker's license, a determination may then be made as to whether or not his conduct in failing to satisfy this judgment qualifies him as a fit person to be so licensed.

CHAPTER VII—BUILDING AND ZONING

Section A. BUILDING

BUILDING CODE VIOLATION CASES—PROCEDURE

(Commissioner, Department of Buildings—H. H. M.—January 9, 1968)

Pursuant to the policy of the Mayor, no Court cases are being dismissed unless the property involved is in full compliance with the Municipal Code of Chicago.

In most of the emergency cases filed for failure to provide heat, the only report we have is for lack of heat. When the heat problem has been solved, we will continue the case for the next date for that area in which the property is located and shall amend our case to include all other violations to be found in the building by the area inspector.

It is therefore requested that a check list inspection be made of each building in which we have filed a complaint for lack of heat and the results of such inspection be forwarded to this office as soon as possible.

"LACK OF HEAT" CASES—PROCEDURE

(Director, Community Union Center, AFL-CIO—R. L. C.—January 17, 1968)

Your recent letter to Mayor Daley outlining a proposal to provide emergency heating in occupied buildings has been referred for review and comment by this department.

The procedure which you outline is very similar to the procedure which the city follows in these "lack of heat" cases. The one exception being that you suggest an ordinance amendment authorizing the city to take control of the building, whereas this department's procedure is to obtain an emergency court order in these cases naming the Chicago Dwelling Association receiver for the purpose of restoring and maintaining heat. The determination of whether or not a building is being maintained and operated in such a manner as to endanger the health, safety and welfare of those legally on the premises is uniquely a judicial question rather than a legislative one and one which the case law in Illinois clearly reserves for the courts.

> "Frequent efforts to state the precise effect of a municipal declaration that a particular thing or activity is a nuisance have proved unsatisfactory (citations). Whatever has been the formula of words used to describe the scope of municipal power, the cases have turned, in the last analysis, upon the *court's* appraisal of the reasonableness of the municipal action. The ultimate question has been the reasonableness of the questioned use of the property in light of all of these surrounding circumstances."
>
> *The City of Nokomis* v. *Sullivan,* 14 Ill. 2d 417

> "The law in this state gives no final or binding effect to the decision of the City Council on this question of the existence of a nuisance."
>
> *Sings* v. *City of Joliet,* 237 Ill. 300.

The status of the law being as stated above, it would seem to be an illusory and unproductive act by the City Council to pass such an ordinance.

In recent weeks we have been able to secure more than twenty-five court orders naming the CDA receiver for the purpose of restoring heat and have enjoyed the total cooperation of the court in issuing week-end and odd-hour orders so that this emergency procedure would be responsive to the needs.

NECESSITY OF SHOWING RELATIONSHIP TO SUBJECT PREMISES

(Mayor of Chicago—J. N. L.—January 18, 1968)

On January 15, 1968, the Illinois Appellate Court rendered an opinion which reversed the judgment of the Circuit Court of Cook County and remanded the case for a new trial. The City of Chicago filed a quasi-criminal complaint against "James Cadillac Thomas" charging him with building violations of the Municipal Code of Chicago. After a trial, an order was entered by the court, which recited that the defendant had been found guilty of the ordinance violations alleged in the complaint. A fine of $1000.00 plus cost was imposed and execution was issued for the amount of the fine and costs, as to "J. Thomas, Conservator".

The Illinois Appellate Court, in reversing the judgment of the Circuit Court, held that the City had failed to prove at trial that James A. Thomas, Successor Conservator of the Estate of Sadie Blair, Incompetent had any relationship to the subject premises. The Court stated that a quasi-criminal complaint must designate the accused exactly.

USE OF "TICKET" PROCEDURE

(Commissioner, Department of Buildings—T. D. O'H.—November 28, 1969)

The "ticket" procedure was instituted to simplify proceedings where an inspector noted a minor violation of the Code. It appears that tickets are now being issued where the inspector observes 4 or 5 violations and therefore issues a ticket for each violation. Many of the violations involve dangerous conditions and it is therefore necessary to have a summons issued and after several continuances, a Chancery suit instituted.

We suggest you consider issuing tickets only where one violation exists and such violation is not of a dangerous or hazardous nature.

CONFLICT OF INTEREST— EMPLOYEE'S ACQUISITION OF PROPERTY

(Commissioner, Department of Urban Renewal—E. L. N.—March 23, 1971)

You have requested an opinion concerning a purported conflict of interest pertaining to the following facts:

Milton Stephens, Director of Property Management Division of the Department of Urban Renewal acquired two lots in the West Woodlawn Project Area. Said property was in the family for more than 50 years, prior to his acquisition. One lot was acquired by purchase through a cousin, the other lot was acquired by gift from his mother. There is presently no acquisition of the subject property

scheduled and, indeed, it appears that none will be in the foreseeable future. Mr. Stephens has also verified that he desires to rehabilitate the subject property without using any federal funds by way of financing.

Our office has reviewed the pertinent case law, and, particularly, Chapter 67½, Section 91.107 of the Illinois Revised Statutes together with Section 704, Part 2 of the Loan and Capital Grant Contract with the Federal Government and concludes that the following test should be applied in determining a possible conflict of interest:

1) Whether the employee's duties, directly or indirectly, are concerned with the acquisition or disposition of Project Land.

2) Whether, in his official position, is able to influence the acquisition or disposition of Department of Urban Renewal land.

3) Whether, because of his official position, he was able to acquire the property in question at an advantageous price to the detriment of the public.

4) Whether, because of his official position, he is able to contract and construct the contemplated structure at an advantageous price, to the detriment of the public.

Our office has reviewed the facts and had a conference with the employee in question and has determined that each of the foregoing questions are to be answered negatively, in that the employee is receiving no benefit either directly or indirectly from his employment in his objective of the rehabilitation of two-family owned properties.

Inasmuch as there has been a complete disclosure of the employee's interest and provided that no federal funds are involved in the rehabilitation work, there is no conflict of interest.

CRIMINAL LIABILITY OF MERCURY WRECKING CO.

(Commissioner, Department of Buildings—W. R. Q.—March 8, 1973)

This is in response to your letter of February 7, 1973, requesting an examination of facts concerning the activities of the Mercury Wrecking Company in the demolition of a four story building at 1234 North Paulina to ascertain the possibility of criminal action against the company by the State's Attorney.

The board rule is well settled that a corporation may be criminally liable. A corporation is a "person" by definition under the Illinois Criminal Code and can theoretically commit any offense. However, corporate criminal liability is limited by § 5-4 of the Code which reads in applicable part:

"(a) A corporation may be prosecuted for the commission of an offense if, but only if: (1) The offense is a misdemeanor, . . . or is defined by another statute which clearly indicates a legislative purpose to impose liability on a corporation; and an agent of the corporation performs the conduct which is an element of the offense while acting within the scope of his office or employment and in behalf of the corporation, . . .

(2) The commission of the offense is authorized, requested, commanded, or performed, by the board of directors or by a high management agent who is acting within the scope of his employment in behalf of the corporation.

From the facts stated in your letter there appears no substantive or procedural bars under § 5-4(a)(1) of the Criminal Code to prevent possible criminal action by the State's Attorney against the wrecking company for the following misdemeanor offenses: § 12-1. Assault.; § 12-3. Battery.; § 12-5. Reckless Conduct.; and § 21-1. Criminal Damage to Property. A referral of the facts for the State's Attorney's consideration of these charges appears in order.

The alleged irresponsible and dangerous manner of wrecking employed by the wrecker and the unfortunate death of the child may raise an inquiry concerning a charge of involuntary manslaughter. A corporation can in our opinion, be found guilty of this charge. Several factors must be present before this charge could be brought. In this regard the Committee Comments to § 5-4(a)(2) of the Illinois Criminal Code observe:

> "Subsection (a)(2) relates to the scope of liability of corporations for criminal offenses of the more serious character. It provides, in effect, that when a corporation is indicted for a felony such as . . . involuntary manslaughter . . . the corporation may not be held liable unless the criminal conduct was performed or participated in by the Board of Directors or by a high managerial agent."

This condition is not readily apparent from the facts at hand. A determination would have to be made concerning whether the wrecking procedure was outlined and directed by someone authorized to act in behalf of the corporation, and then whether the method so employed was reckless, as legally defined. Such determinations, if they are to be made, would, of course, be made by the State's Attorney.

DEMOLITION OF UNSAFE BUILDINGS

(City Council—G. F. H.—March 9, 1971)

On March 2, 1971, the Illinois Appellate Court reversed and remanded a Circuit Court of Cook County decision in favor of the City of Chicago. The case involved an order of demolition and a judgment that imposed a lien on the real estate for costs of demolition.

In reversing and remanding the lower court's decision, the Illinois Appellate Court held that a municipality must always prove that a building is totally beyond repair before a dangerous and unsafe building can be demolished to protect the public. The Court states (opinion p. 7):

> "[U]nless plaintiff had proved the building in this case could not be repaired and the municipal code violations corrected by means other than complete destruction, it had to seek relief other than demolition."

The feasibility of a petition for leave to appeal to the Illinois Supreme Court is under study.

DEMOLITION OF GARAGES

(Commissioner of Buildings—R. L. C.—March 25, 1969)

Your letter of February 13, 1969 informs us of an Application made to the Department of Housing and Urban Development for "Federal Demolition Grant #2" and of the Regional Administrator's response to that Application which states in part:

> "We will not be able to accept the subject application for processing until the following documentation has been submitted: 1. Opinion of Counsel respecting: (a) Procedures to be used to secure remedial actions by the owners of the structures involved and whether these actions represent an exhaustion of legal procedures."

It appears that this question is limited to that portion of the proposed Demolition Program relating to "demolition and removal of unsound and dilapidated sheds and garages which are a harborage or potential harborage or rats, constitute a public nuisance and a serious hazard to the public health and welfare".

The demolition cost per structure of these buildings is estimated to be $250.00 and the procedure which you outlined to the Department of Housing and Urban Development is one of obtaining consent of the owner prior to demolition action. By the terms of the City's Application, the program will be carried on "within the confines of Project Areas to include Neighborhood Service Center Areas, Redevelopment Project Areas, Conservation Areas, Neighborhood Development Program Areas". The nature of the communities to be served, the condition of the buildings to be removed, the dangerous and degrading health and public welfare problems being abated, all point to the urgency with which the Program should be approached and to the public purpose which will be served by such action.

It is in the light of these facts as they apply to this Application for a Demolition Grant that the "Demolition Grant Program Handbook" (RHA 7300.1, Chapter 2, Page 1) calls for a finding that

> ". . . . all available legal procedures to secure remedial action by the owners of the structures involved have been exhausted and that demolition by governmental action is required."

In applying this language, it is apparent that reasonableness is to be assumed and absurdity is to be avoided. Where consent of the owner of the dilapidated shed or garage is solicited and obtained, together with his affirmative statement of financial inability to undertake the action himself, it would, in the opinion of this office, be unreasonable to add to the $250.00 estimated cost of wrecking, a figure almost one-half again that much as the cost of prosecution by the City's legal staff. (See Journal of Proceedings of the City Council December 13, 1968, Page 4155) Inasmuch as the formal inspection notice, administrative detail, and legal costs would be reimbursable, the result would be a greatly increased average cost per unit and the resultant removal of fewer sheds and garages at a pace considerably slower than contemplated in the Application.

"Remedial Action" appropriate to the sheds and garages in question is their removal. The test of the reasonableness of this segment of the Demolition Program should and must be made in light of the over-all programs for the areas in question. These include demolition of major or primary buildings in advance stages of dilapidation under the terms of this same Application and with assurances of the "exhaustion of Legal Procedures". It also includes concerted action by Conservation, Redevelopment, or Neighborhood Service Center agencies. To apply the letter of the regulation (RHA 7300.1, Chapter 2, Page 1) and demand that the full arsenal of legal resources be employed against each and every shed and garage found to be rat infested and dilapidated in areas already receiving considerable attention and encouragement, is to ignore the public benefit of the proposal, introduce an absurd burden, give weight to words rather than reason, and render the proposal ineffectual and unworkable.

That a public purpose is served by the removal of these sources of blight and rat harborage would seem to be unquestioned. That the regulation calling for the "exhaustion of Legal Procedures" is appropriate and necessary where there exists a potential for great *private benefit* is also unquestioned. Where the danger of private benefit to the property owner exists, the subject Application for Federal Demolition Grant #2 and HUD's previous experience with Chicago's Demolition Program (Demolition Grant Contract No. Ill. M-1 (G) with USA) provides assurance of the City's utilization of "all agailable legal procedures". Where, however, the private benefit to be derived from the demolition is nonexistent, or at best small, the *regulations should not be construed or invoked so as to preclude a considerable public benefit.* Exhibit No. 1 which accompanies Chicago's Application (letter of December 27, 1968, from the Acting Commissioner of Health to the Commissioner of Buildings) gives support to the public health hazard of these sheds and garages and appears to be unchallenged by the Regional Administrator.

It is the opinion of the Corporation Counsel that the narrative which accompanied the City's Application for Federal Demolition Grant #2 describes the procedure for a program which meets the test prescribed by the Demolition Grant Project Handbook and which is in harmony with the intent of the regulation to guard Demolition Grant Funds from being channeled into private gain situations.

FENCE ERECTION ON PRIVATE PROPERTY

(D. G. H.—A. F. K.—May 29, 1968)

Your recent letter to the Corporation Counsel, concerning erection of a fence on your property at 3905 North Keeler Avenue has been referred to the undersigned for reply.

In your letter you ask if a fence five (5) feet high can be erected along the south boundary of your property without first obtaining the consent of the adjacent property owner.

Please be advised that the Ordinances of the City of Chicago do not require the consent of adjacent property owners prior to the construction of such a fence. However, your property may be subject to private agreements concerning this matter. We suggest that you consult with your own attorney who can advise you of your rights.

CONVERTED BUILDINGS

(Commissioner, Department of Buildings—T. D. O'H.—October 30, 1969)

For some years now the Law Department has been trying to point out to various Judges that we need not prove a conversion to obtain an order requiring proper fire resistant separation of units.

It appears from *City of Chicago* v. *Miller,* 27 Ill 2d 211, that these provisions "apply to all buildings." Most defendants argue that the building is original construction and so they need not comply.

In order to reduce the conversation, proofs and arguments regarding "original construction" would you please discontinue using the "deconvert count" in the complaints. The information as to the original construction can still be included at the lower portion of the list of violations for informational purposes.

We are inclosing a current list of violations to illustrate our point. If you have any questions please let me know.

FACILITIES FOR THE HANDICAPPED

(Commissioner of Buildings—P. M. S.—May 28, 1971)

We are in receipt of your letter pertaining to the Facilities for the Handicapped Act, Chapter 111, Sections 1-8, Illinois Revised Statutes, 1969. Your letter requests our opinion with respect to your responsibilities under this Act and also our opinion with respect to what type of buildings, structures and improved areas fall within the provisions of this legislation.

Section 6 of the Facilities for the Handicapped Act provides as follows:

> "One year after approval of this Act, no building permit or other official authorization for construction of a public accommodation by any person is valid unless it recites that the plans and specifications meet these standards."

Section 43-1 of the Municipal Code of Chicago provides that building permits shall be obtained from the Commissioner of Buildings. Your responsibility under the Facilities for the Handicapped Act would, therefore, be to insure

that the plans and specifications submitted to your department for the construction of a public accommodation meet the standards promulgated by the Director of General Services pursuant to Section 4 of the Facilities for the Handicapped Act, and then to recite upon the permit that the plans and specifications do in fact meet these standards at the time the permit is issued.

This necessarily brings us to a consideration of what is a public accommodation within the meaning of the Facilities for the Handicapped Act. Section 2 of this Act provides in part as follows:

"In this Act

'Public building' means: (a) a building, structure, or improved area owned or leased by this State or its political subdivisions; (b) a building, structure or improved area used primarily by the general public as a place of gathering or amusement, including but not limited to: theatres, restaurants, hotels and stadia. All public accommodations are public buildings.

'Public accommodation' means a building, structure or improved area which is used primarily by the general public as a place of gathering or amusement, including theatres, restaurants, hotels and stadiums. All public accommodations are public buildings."

The legislature has the power and authority to define, for the purpose of a statute, the terms therein used, and where it has undertaken to do so, the definition as therein prescribed must prevail in applying the statute. *Bohm* v. *State Employees' Retirement System*, 404 Ill. 117; *Krebs* v. *Thompson*, 387 Ill. 471.

The Court in the case of *Mid-South Chemical Corporation* v. *Carpentier*, 14 Ill. 2d, 514, p 519, stated that in Webster's Dictionary, Second Edition, the "adverb 'primarily' is defined as 'pre-eminently, fundamentally' ", and adopted such definition in making its decision. Webster's Third New International Dictionary defines the word "gathering" as "a coming together of people in a group (as for social, religious or political purposes); assembly, meeting". In the case of the *City of Chicago* v. *Green Mill Gardens*, 305 Ill. 87 at p 93, the Court stated that "Webster says that the word 'amusement' is synonymous with diversion, entertainment, recreation, pastime and sport".

While the statutory definition of a public accommodation, therefore, appears to be definite, certain, and an effective criterion to determine whether or not a specific facility is a public accommodation, it becomes ambiguous when it is noted that two of the four statutory examples of a public accommodation (hotels, restaurants) are not in their most basic use a building, structure or improved area used primarily by the general public as a place of gathering or amusement.

Where the language of a statute is uncertain, the legislative intent of the General Assembly must be gathered from a consideration of the entire act. *City of East St. Louis* v. *Touchette*, 14 Ill. 2d 243.

Section 3 of the Act points out that "facilities for handicapped persons in public buildings are an object of serious public concern." This section also clearly indicates the General Assembly intended to insure that persons confined to wheelchairs could safely and conveniently use and enjoy all public buildings constructed after September 5, 1968. In the construction of statutes all general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out. Chapter 131, Section 1.01, Illinois Revised Statutes, 1969.

The title of the Act under consideration was amended on September 5, 1967 to read as follows: "An Act to provide facilities for the handicapped in buildings open to the public." It is a principle of construction often announced, that the intention of the law makers is to be found and given effect, and where the language of the act is obscure or its meaning doubtful, resort may be had to the title thereof to discover the intent and make certain what is otherwise uncertain or ambiguous. *Illinois Bell Telephone Co.* v. *Ames*, 364 Ill. 362.

Where the language of a statute is not entirely clear or certain, it is proper not only to compare statutes relating to the same subject matter, but to consider

statutes upon related subjects though not strictly in pari materia. *Bergin* v. *Bd. of Trustees of the Teachers' Retirement System,* 31 Ill. 2d 566.

Chapter 38, Sections 13-1 through 13-4 of the Illinois Revised Statutes, 1969, is entitled "Violation of Civil Rights." This legislation pertains to criminal penalties for denying to people the full and equal enjoyment of the facilities of any public place of accommodation or amusement because of race, religion, color or national ancestry. Section 13-1(a) thereof, provides in part as follows:

> "A public place of accommodation or amusement includes inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors, taverns, roadhouses, barber shops, department stores, clothing stores, hat stores, shoe stores, bathrooms, restrooms, theatres, skating rinks, public golf courses, public golf driving ranges, concerts, cafes, bicycle rinks, elevators, ice cream parlors, . . . public swimming pools and other places of public accommodation and amusement."

While it is patent that the above statute is not strictly in pari materia with the Facilities for the Handicapped Act, nonetheless, each of these statutes deal with ensuring that various segments of society have unrestricted access to places of public accommodation.

It is our opinion, therefore, that any building, structure, or improved area that invites the general public, either expressly or by implication, to enter their premises is a public accommodation within the meaning of this Act.

The Director General Services of the State of Illinois has issued a publication entitled "Standard Specifications For Facilities for the Handicapped". His office has adopted a somewhat similar construction of a public accommodation as evidenced by the following statement taken from Page 1 of the said publication: "This standard applies to all buildings and facilities used by the public".

Section 2 of the Facilities for the Handicapped Act provides in part that "All public accommodations are public buildings." It is our opinion, therefore, that if a building, which is not itself a public accommodation, has a public accommodation located therein, that this building must also comply with the provisions of this Act to the extent that the building as a whole is used by the general public to gain access to the public accommodation located therein. An example of this type of situation would be a high rise apartment building containing a restaurant.

If our office can be of any further assistance to you in this matter, we shall be happy to be of service.

EXEMPTION OF BOARD OF EDUCATION FROM INSPECTION FEES

(City Comptroller—A. H.—February 10, 1969)

A recent letter addressed to you by John R. Borling, Director of Plant Operation and Maintenance, has been referred to the Law Department for consideration and advice. The Board of Education takes the position that it has not been the policy of the City to bill the Board of Education nor the policy of the Board to pay for inspection fees and services, allegedly an established practice of long standing.

You have enclosed five warrants for collection returned to you by Mr. Borling, which we herewith also return. Although the inspection fees purport to cover "inspection of buildings," four of the five warrants bear notations of what appears to be the name of elevator manufacturers, thereby raising the question as to whether the fees are for the inspection of buildings alone or elevators as well as buildings.

The Municipal Code of Chicago contains provisions which exact an inspection fee under certain circumstances and which exempt certain educational and other institutions from paying inspection fees under certain circumstances, depending upon the object to be inspected. For example, under Chapter 46, Section 46-7, educational institutions, among others, are exempted from paying an "annual inspection of building fee" when accompanied by applications for exemption properly supported by affidavit. Section 46-11, however, relating to elevator inspection fees, makes no such exemption and may therefore be exacted from an institution such as the Board of Education. In such case, a common practice has arisen wherein a special ordinance may be introduced before the City Council exempting the Board of Education from paying such a fee, and cancelling warrants for collection of same.

If your records disclose that the fee sought to be exacted under the warrants for collection are for building inspections alone, the same may be exempted upon due application, as indicated above. If, however, the fees are for elevator inspections, a special City Council ordinance would have to be secured in order to obtain said exemption and cancel the warrants for collection.

"WHIZZER" WARRANTS

(Chief, Environmental Health Branch, Public Health Division—T. D. O'H.—January 29, 1968)

The Supreme Court's decision requiring Search Warrants for inspection of buildings has in some ways made our Code enforcement functions less time-consuming. The attendant publicity caused some less sophisticated owners to believe the City could not inspect. Some of these individuals thereafter refused entry to their buildings.

Since the opinion authorized a Court to issue a Search Warrant for specified reasons, and those reasons include any inspection made by the City of Chicago, we have had no problem in obtaining "Whizzer Warrants". We have a form Petition which we take before any Judge. The Petition recites the reason for the inspection and that admittance was refused. After hearing the sworn testimony of the inspector the Court issues the Warrant. The inspector then goes to the premises and serves the Warrant and makes the inspection. If he encounters any difficulty in gaining admittance, the Police are called upon to assist. To date it has been necessary to obtain less than twenty (20) Warrants and we have had no difficulty in gaining entry.

Before this decision it was our practice to file a Chancery action, serve the owner with a summons, and thirty (30) days after the defendant was served we would have a trial. This consumed approximately sixty (60) days. The new procedure can take a few hours since no service on the owner is required before the issuance of the Warrant. We thus can save several months time through this new procedure.

Since this theory of requiring a Search Warrant for building inspections is new to Illinois law, there seems to be no Statutory or case law covering the issuance of the Warrant. The reaction of the Judges to the new requirement for a Warrant should probably be given by them. Since they have issued Warrants on every Petition it would seem their reaction might be that if the Supreme Court feels it is necessary they will do it.

Our impression of the reaction of attorneys representing building owners is that they do not feel the Warrant requirement is of any use to them.

To date we have not had a challenge on our current procedure. We are enclosing a copy of our Petition and Order.

CERTIFICATE OF COMPLIANCE

(Executive Secretary Back of the Yards Neighborhood Council—R. L. C.—October 22, 1968)

In reply to your letter of October 7, 1968, I have enclosed a copy of Senate Bill 1996, approved August 20, 1968, which amends an Act passed August 11, 1967 on the same subject.

Briefly, the status of the law today is to require that a certificate of compliance or a written warranty of the seller accompany and be incorporated with any installment contract for the sale of a dwelling structure (12 or less family units). Certificate of compliance is defined by the Act as an "affidavit executed by a contract seller stating that the dwelling structure was inspected within 30 days before the contract was executed by an Inspector of the Municipality . . . and that at the date of the execution of the contract the dwelling structure is not in violation of any dwelling code." (It is important to note that this certificate of compliance is not a certificate issued by the Building Department.)

If a certificate of compliance as so defined is not supplied by the contract seller an "express written warranty" stating that no building violation notice has been received within the last ten years or a listing of all such notices and violations received must be supplied to the contract seller.

The Act provides that an installment contract shall be voidable at the option of the buyer when these provisions are not followed and that these requirements may not be waived by either the buyer or the seller.

"LANDMARK" DESIGNATION—PROCEDURE

(Chairman Committee on Cultural and Economic Development—F. G. S.—April 13, 1971)

Your letter of March 30, 1971, addressed to Richard L. Curry, Corporation Counsel has been referred to the undersigned for attention and reply. In your letter you advise that three proposed ordinances from independent sources designating 30 North LaSalle commonly known as "The Old Stock Exchange Building" as a Chicago Landmark filed with the City Clerk were referred to your Committee on March 29, 1971. You further note that none of these proposed ordinances are supported by a recommendation from the Commission on Chicago Historical and Architectural Landmarks. You request an opinion as to whether or not the Committee has anything before it upon which it can properly and legally act relative to "The Old Stock Exchange Building."

Chapter 24, pars. 11-48.2-1 thru 11-48.2-7, (Ill. Rev. Stat. 1969), grants the power and establishes the procedures to be followed under which Municipal Authorities may preserve Historical and Architectural Landmarks. The Municipal Authorities may provide by ordinance for the administration of the powers granted in this section by a special commission, etc.

Pursuant to the authority granted in Chapter 24, par. 11-48.2-3, (Ill. Rev. Stat. 1969), the City Council of the City of Chicago adopted Section 21-64 of the Municipal Code of Chicago by virtue of which it designated the Commission on Chicago and Architectural Landmarks to administer the provisions and powers set forth in Chapter 24, par. 11-48.2-2 (Ill. Rev. Stat. 1969), as thereinafter contained in Section 21-64, 2-64.1 and 21-64.2 of the Municipal Code of Chicago.

Section 21-64 of the Municipal Code of Chicago provides a step by step procedure to be followed in the process of designating "Historical and Archi-

tectural Landmarks". The procedure calls for the Commission on Chicago Historical and Architectural Landmarks to recommend to the City Council the adoption of ordinances designating "Chicago Landmarks" after certain steps have been taken by the Commission preliminary to such recommendation by the Commission. Action by the City Council is contemplated only after receipt of such recommendation from the Commission.

In the matter at hand, it is our opinion that the ordinances received by the City Clerk and referred to your Committee should be properly referred to the Commission on Chicago Historical and Architectural Landmarks for its appropriate action in conformity with the provisions of Section 21-64 of the Municipal Code of Chicago.

It is our further opinion that the earlier recommendation by the Commission, properly referred to the City Council, then to your Committee and acted on by the Council on August 10, 1970, when the Council voted not to concur in the Commission's recommendation to designate "The Old Stock Exchange Building" as a Chicago Landmark, has been disposed of and there is nothing presently pending before the Council or your Committee relative to this matter upon which proper and legal action could be taken. It will be necessary for the Commission to make and submit a new recommendation regarding this matter to the City Council for its further appropriate action.

PUBLIC HEARINGS RE: "LANDMARKS"

(Chairman, Commission on Chicago Historical and Architectural Landmarks—R. L. C. & F. G. S.—February 24, 1971)

Your recent letter requests an opinion as to whether a public hearing should be scheduled automatically, or dispensed with, where the Commission on Chicago Historical and Architectural Landmarks proposes publicly-owned sites and structures for designation as "Chicago Landmarks".

The language of Chapter 24, Section 21-64, Sub-Section (d) of the Municipal Code of Chicago appears to make it clear that a public hearing shall be held by the Commission where it does not receive written consent from the owner to the designation of the site or structure.

Therefore, it is our opinion that unless written consent to designation is received from the governmental authority under whose jurisdiction ownership of the publicly-owned site or structure proposed for designation as a landmark lies, a public hearing is required to be held by the Commission.

"LANDMARK" DESIGNATION CONTESTED

(Chairman, Commission on Chicago Historical and Architectural Landmarks—F. G. S.—April 20, 1971)

Your letter of March 29, 1971, addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for attention and reply. With your letter you enclosed a copy of a letter from the 30 North LaSalle Street Partnership, which owns a leasehold interest in the 30 North LaSalle Street property, refusing to consent to the proposed designation of said building as a "Chicago Landmark". You request that we examine the letter to determine whether or not there is any basis for the threats that seem to be implied in it, and more specifically you request that we advise what sort of damages the City of Chicago might be subjected to if the designation procedure is continued. You further ask for our opinion of any other ramifications that action by the Commission in this matter might have.

With respect to your questions as to whether or not there is any basis for the threats that seem to be implied in the letter from the 30 North LaSalle Street Partnership and what sort of damages the City might be subjected to if the designation procedure is continued, we must advise that these are questions of law and fact to be determined by a court, if and when a suit is filed and depending upon whether or not the allegations contained in a complaint, supported by the evidence, warranted an adjudication of damages.

A review of Chapter 24, Paragraphs 11-48.2-1 through 11-48.2-7 (Ill. Rev. Stats. 1969), the statutory authority pursuant to which corporate authorities may provide for the official designation by ordinance of historical and architectural landmarks contains no limitations with respect to the number of times that the proposed areas, place, building, structure, works of art and other objects having a special historical, community, or esthetic interest or value might be considered and proposed for designation as a historical or architectural landmark.

Likewise, Chapter 21, Sections 21-64, 21-64.1 and 21-64.2 of the Municipal Code of Chicago adopted pursuant to the statutory authority contained in Chapter 24, Paragraphs 11-48.2-1 through 11-48.2-7 (Ill. Rev. Stats. 1969), by virtue of which the Commission is empowered to act, contains no limitation with respect to the number of times that the proposed areas, places, buildings, structures, works of art and other objects might be considered and recommended for designation by ordinance by the City Council as "Chicago Landmarks".

It should be borne in mind that where such limitations do not exist this does not authorize an administrative agency such as yours which operates on a quasi-legislative level to unlimited exercise of authority to hear and re-hear matters previously acted upon; such action is appropriate where new matters are sought to be presented.

The Courts have held that an administrative agency such as yours which operates on a quasi-legislative level is beyond the limitations of res judicata in terms of considering issues previously presented involving the same subject matter, especially when, as in this instance, new matters are sought to be presented, and an opportunity is given to present evidence and argument on the question.

It should be noted that the Commission's power is limited to "recommending" designation by the City Council, and in connection therewith following the procedures preceding such recommendation as required by Section 21-64 of the Municipal Code, including: 1) reaching a preliminary conclusion; 2) advising the Commissioner of Development and Planning of its conclusion and securing his recommendation; 3) contacting the owner or owners to secure their consent in writing to the proposed designation; 4) holding a public hearing in the event said owner or owners refuse or decline to consent and finally; 5) submitting in writing its recommendation concerning the proposed designation to the City Council.

None of the steps, taken by the Commission as outlined above, in any way affect the enjoyment or disposition by the owners of the given property proposed for Landmark designation during the time that these steps are being taken.

It is therefore our opinion that the Commission pursuant to the decision taken at its February 17, 1971, meeting, in light of new evidence presented to it with respect to the possibility and means of saving the 30 North LaSalle Building, is proceeding properly within the authority granted it under the provisions of Chapter 21, Section 21-64 of the Municipal Code of Chicago.

RELOCATION OF STOCK EXCHANGE ARCH IN GRANT PARK

(Commissioner of Public Works—R. L. C.—May 11, 1972)

Your letter of April 19, 1972, requests advice on two problems relating to relocation of the Stock Exchange arch:

1) Possible legal obstacles to placing the arch in Grant Park.

2) Formal agreement with the owners committing them to payment of $250,000 in restoration expenses.

Research on the first of these issues reveals serious difficulties. As you know, construction in Grant Park has been the subject of frequent legal action since the 1890's. The leading case is *City of Chicago* v. *A. Montgomery Ward,* 169 Ill. 392 (1897). Succeeding cases included *A. Montgomery Ward* v. *Field Museum,* 241 Ill. 496; *South Park Comrs.* v. *Ward and Co.,* 248 Ill. 299; *Stevens Hotel Co.* v. *Art Institute of Chicago,* 260 Ill. App. 555; and *Mike Blvd. Bldg. Co.* v. *Chicago Park Dist.,* 412 Ill. 350 (1952). It has been consistently held throughout the 50-year history of the litigation represented by these cases that the property owners on the West Side of Michigan Avenue hold easements over Grant Park which prevent any construction in the Park without their consent. The single exception to this rule appears to be The Art Institute and it, in fact, was permitted by consent of the above-mentioned property-owners, which consent was recognized in a City ordinance of 1891. The original *Montgomery Ward* decree specifically noted the unique status of The Art Institute and stated: "Provided, however, nothing in this decree contained shall be construed to prohibit, enjoin or restrain the use, occupation, repair *or necessary enlargement* of the building known as The Art Institute, situated opposite the east end of Adams Street, so long as the same shall be used in accordance with the terms of the ordinance of the City Council authorizing the construction and location of the same. . . ." Thus, The Art Institute itself is permitted only with the strict confinements of the original ordinance. No mention is made of outside art pieces or independent structures. The building itself was limited to a 400 foot maximum frontage and permitted to expand only within defined rules.

The conclusion I draw from this is that location of the arch upon the suggested site could probably be accomplished only with the permission of the Michigan Avenue property owners. I cannot estimate the difficulties in attaining their unanimous consent to this undertaking.

Formal agreement with the arch owners on the subject of their $250,000 commitment provides some assurance to the City that that money will actually be forthcoming. There are difficulties in the legal enforcement of agreements to make a gift or charitable contribution. The heart of the problem is that ordinarily no legal consideration is found in a contract to make a gift so that until the gift is actually delivered the promise is held to be revocable.

In *In re Estate of Drain,* 311 Ill. App. 481 at 484, the Court said:

> Any attempt to reconcile the cases from various jurisdictions on the validity of voluntary engagements to pay money for charitable purposes would be of no avail. Different theories have been advanced for sustaining such contracts. The facts and circumstances in the various instances differ widely, as well as rules and interpretations applied as tests of the validity to such undertakings.
>
> A few courts have indicated that a subscription agreement is enforceable without the necessity of legal consideration sufficient to support an ordinary contract. However, we do not find this jurisdiction to be in that group. It would appear that under the rule in this State, a gratuitous subscription for a charitable purpose is considered as a continuing offer to make a gift, and until accepted or acted upon by the recipient in such a manner as to raise a consideration, it is unenforceable and may be withdrawn, since until such

time, it is deemed to be without consideration. Thus, we find that if the promise on the faith of the subscription, and before its withdrawal, performs some act such as the expenditure of money or incurring liabilities which are enforceable, in furtherance of the enterprise the promisor intended to assist or promote, consideration for the subscription is then supplied, and the same is thereafter deemed to be valid, binding and enforceable.

The obvious conclusion to be drawn from this statement is that regardless of how the agreement is drawn it probably would remain legally unenforceable and revocable until the City took some substantial step in reliance upon the $250,000 pledge.

Though no particular formalities are required in a subscription agreement, *Drain* makes it clear that consideration should be recited in the agreement. It also should be noted that various tax considerations may cause the donors to prefer drafting the agreement themselves so as to obtain the most advantageous treatment in that respect.

Accordingly, I would offer the following only as a suggestion of the general sort of agreement likely to be useful to the City:

> In consideration of our mutual promises herein contained and in consideration of the undertaking of the execution of the purpose of this subscription, we, the undersigned subscribers agree, jointly and severally, with all and each other of us, and with the City of Chicago, a Municipal Corporation of the State of Illinois, to give to the said City for the purpose of the relocation, erection and maintenance in a public place of the Chicago Stock Exchange Arch, the amounts set opposite our respective names, payable as follows:
>
> [Signatures, adding to each the amount of the subscription and address].
>
> This subscription shall inure to the benefit of and be binding on the heirs, executors, administrators, and successors of the parties hereto:
>
> DATED ....., 19.....

Be assured that the Law Department stands ready to either draft the necessary documents or to meet with representatives of the donor and negotiate appropriate terms.

OWNERS COMPLAINTS AGAINST "LANDMARK" DESIGNATION

(Chairman, Commission on Chicago Historical and Architectural Landmarks—F. G. S.—January 11, 1973)

Your letter of December 6, 1972, addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for attention and reply. You request an opinion as to what action the Commission may take when owners of designated landmarks enter complaints with the Board of Tax Appeals and request assistance in the matter from the Commission. You attach a copy of a proposed resolution drafted and submitted by the owner of a parcel of property located within the area known as the South Pullman District which was designated as a "Chicago Landmark" on October 16, 1972, with a request that the Commission adopt the resolution and if said resolution is adopted to write a letter in conformity therewith to the Board of Appeals.

With respect to the proposed resolution submitted with your letter, it is our opinion that the Commission is in no position to adopt such a resolution, unless it made an independent study to ascertain the validity of statements made therein with respect to the extent of the depreciation, costs of repair and renovation and its impact on the current tax assessment. Neither the statute nor the ordinance contemplate this kind of action by the Commission. It is our further opinion

that the Commission's obligation is limited to the actions provided for in the ordinance, Section 21-64 (g), namely:

> "As soon as reasonably possible, the Commission shall notify the Building Department of the City of the official designation. The Commission shall also file with the Assessor of Cook County a certified copy of the designation ordinance together with a notice briefly stating the fact of said designation and a summary of the effect said designation will have. The Commission, further, shall send a certified copy of said ordinance and a copy of said notice hereinabove described to the owner or owners of said property by registered mail."

In addition to this, either the owner or the Commission at the owner's request could transmit to the Board of Appeals a copy of the designation ordinance together with a copy of the notice stating the fact of said designation and a summary of the effects said designation will have, as well as a copy of Chapter 24, paragraph 11-48.2-1 through 11-48.2-6, 1971 Ill. Rev. Stats., and a copy of Chapter 21, Sections 21-64, 21-64.1 and 21-64.2 of the Municipal Code of Chicago.

Insofar as the presentation of evidence to the Board of Appeals, with respect to the depreciation occasioned by the restrictions imposed on the property designated as a Chicago Landmark, is concerned, this is something that must be done by the owner since he is in the best position to develop and present evidence to sustain his assertion of depreciation occasioned by the restriction of landmark designation.

LIABILITY OF CITY TO LEAD POISONING VICTIM

(City Council—G. F. H.—March 18, 1971)

On March 16, 1971, the Illinois Supreme Court filed an opinion affirming the judgment of the Circuit Court of Cook County dismissing this case against the City.

The case involved a minor child who sustained injuries after eating lead paint off the walls of a privately owned apartment building. The suit was brought in his behalf in an attempt to impose liability on the City for failure to enforce the Housing Code.

The Illinois Supreme Court, in affirming the decision in favor of the City, noted (Opinion pp. 3-4):

> "If the failure of the City to enforce this ordinance should render it liable for injuries sustained thereby, the tremendous exposure to liability would certainly dissuade the City from enacting ordinances designed for the protection and welfare of the general public, and thereby the general public would lose the benefit of salutary legislative enactments."

WAIVER OF BUILDING PERMIT FEES

(Commissioner of Buildings—A. H.—February 7, 1969)

In a recent letter addressed to Corporation Counsel Raymond F. Simon, your predecessor, Sidney D. Smith, enclosed a copy of a letter addressed to him from the Chancellor of the Chicago City College, asking for the waiver of permit fees for the erection of the new West Side Community College. The building is to be built and owned by the Illinois Building Authority, but leased to the College. An opinion was requested as to whether said fees may be waived.

The Illinois Building Authority is a body corporate and politic which has as its purposes the construction for use by the State of Illinois such facilities as the State may deem necessary (Ill. Rev. Stat. 1967, Ch. 127, pars. 213.1, 213.2). The Authority is authorized to lease facilities and sites to any Junior College District Board (Ill. Rev. Stat. 1967, Ch. 127, Par. 213.5(B)), such as the West Side Community College.

It is clear from the various provisions contained in the Illinois Building Authority that the Authority functions as an agency of the State of Illinois.

This Department, under similar situations, has expressed the opinion that inspection fees charged for the inspection of buildings owned by the State of Illinois should not be assessed or collected from the State of Illinois. In an opinion dated November 7, 1914 (Op. Corp. Couns. 1914-15, p. 106), we held that the City's elevator inspection ordinance could not be enforced against the State of Illinois. In an opinion dated July 29, 1915 (Op. Corp. Couns. 1915-16, p. 182), it was decided that the City's Building Department could not require the State of Illinois to secure from it a building permit to erect the 2nd Regiment Armory. In an opinion dated April 15, 1924 (Op. Corp. Couns. 1923-24, p. 862), this Department expressed the opinion that the State of Illinois could not be required to pay a vehicle license fee for a vehicle owned by the State and operated for State purposes and, in an opinion dated April 3, 1933 (18 Op. Corp. Couns., p. 376), it was held that the City could not enforce the payment or compel the collection of building inspection fees on State-owned buildings which were leased to railroad companies and sublet to a grain company. See, also, *Fagan* v. *City of Chicago,* 84 Ill. 227, 234.

Accordingly, it is the opinion of this office that the City of Chicago is without authority to assess or collect a building permit fee from the Illinois Building Authority with respect to the construction of the West Side Community College.

REVOCATION FOR FAILURE TO MEET PARKING REQUIREMENTS

(Commissioner of Buildings—A. H.—June 26, 1973)

You have asked for an opinion as to the legality of your revoking a building permit in the above-captioned matter. You state that the permit and plans at face value show compliance with the off-street parking requirements of the Chicago Zoning Ordinance, but the spaces are not fully available to the occupants of the building. You have attached documents which purport to show that a number of off-street parking spaces required for the subject building at 2126-28 N. Lincoln Park West have in fact been allocated to the owners of an adjacent building at 2130 N. Lincoln Park West.

We have examined the documents to which you make reference together with the letter to you from Commissioner Lewis W. Hill, withdrawing the approvals submitted by him as Commissioner of the Departments of Urban Renewal and of Development and Planning and although the attached copy of the building permit application for 2126-28 N. Lincoln Park West shows that there will be thirty apartment dwelling units in the proposed building, with off-street parking provided for thirty automobiles, Commissioner Hill's letter appears to indicate that in fact forty-five spaces for off-street parking will actually be provided.

The off-street parking requirements for multiple family dwelling structures in an R7 District, in which the subject building is located, requires parking spaces equal in number to 100% of the number of dwelling units for the first fifty units located within a building (Chicago Zoning Ordinance, Chapter 194A, Section 7.12-3(2)). Therefore, assuming that the proposed construction contemplates but thirty dwelling units, thirty of said off-street parking spaces must be allocated for use by occupants of the building. Under Section 7.12(1) of the Zoning Ordinance, in an R7 District, no more than 25% of the accessory parking spaces required for

a multiple dwelling unit may be rented on a monthly basis to occupants of other dwellings, lodging houses, or hotels. Since thirty off-street parking spaces are required for a thirty unit apartment building, only seven of such spaces could be allocated for use by occupants of other dwellings, lodging houses or hotels, and a total of twenty-three automobile off-street parking spaces must be provided for use by the occupants of the subject building.

The question arises as to whether twenty-three off-street parking spaces are being so provided under the facts presented. Attached to your letter are documents which purport to demonstrate that thirty-six of the forty-five spaces set aside for off-street parking in the subject building have been made subject for use by occupants of a building located at 2130 N. Lincoln Park West by Virtue of a perpetual easement running with the land to the owners of condominium units at 2130 N. Lincoln Park West. These documents include riders to condominium purchase agreements involving the 2130 N. Lincoln Park West building, a certified copy of an easement agreement recorded in the office of the Recorder of Deeds on June 1, 1971, as Document No. 21497059; and a copy of a settlement agreement resulting from a lawsuit entitled *Thomas Pierce, et al.* v. *Lincoln Park West Condominium Associates, Inc., et al.* 72 CH 3387. The easement document reveals that the owner and developer of the property at 2126-28 N. Lincoln Park West has apparently granted to the owners of the property at 2130 N. Lincoln Park West a perpetual easement on the property at 2126-28 N. Lincoln Park West for the purpose of parking or erecting a parking garage which will accommodate no more than thirty-six American standard size automobiles, which cars shall be those of the owners of the individual condominium units being sold at 2130 N. Lincoln Park West. This easement, which has been recorded and is of record, purports to run with the land and to be binding upon all parties, grantees, heirs, successors, personal representatives or assigns perpetually. Easements for off-street parking are valid and enforceable and preclude the use of such space so set aside for any other purposes. See, *e.g., Walgreen Co.* v. *American Nat'l Bank & Trust Co.*, 4 Ill. App.3d 549.

If the foregoing facts are correct, it would appear that the off-street parking requirements of Section 7.12-3(2) and 7.12(1) cannot be fulfilled for the proposed construction and the building permit would be therefore the subject for revocation proceedings since the proposed construction meets neither the letter nor the intent of the ordinances of the City of Chicago inasmuch as thirty-six of the forty-five spaces are subject to a perpetual easement which excludes their use by occupants of the proposed construction thereby leaving but nine off-street parking spaces for said occupants whereas a minimum of twenty-three is required.

It is suggested that you take appropriate steps to prevent the construction as presently revealed by the attached documents and that you give the applicant for permit an opportunity to explain his position in this matter before permitting construction to proceed.

RODENT CONTROL SERVICE

(Editor of Action Line—J. K. M.—January 29, 1970)

Replying to the inquiry of Mrs. M. Robinson, please be advised that the City of Chicago has attached the greatest urgency to the problem of eliminating rats and vermin from our city.

To this end, the City employs numerous inspectors to investigate and determine whether rats are present in buildings so reported.

If rats are found to exist in a building, the owner is notified and ordered to take the necessary steps to rid the premises of the rats. In the event that, within a reasonable period of time, the owner has not corrected the situation, the City of Chicago, through its Rodent Control Department, sends a crew of men to perform the exterminating services.

Pursuant to the provisions of Chapter 99-61.9 of the Municipal Code of Chicago, the owner is then billed for services rendered by the City. This was the procedure that was followed in Mrs. Robinson's case.

Enclosed is a Xerox copy of the work sheet of the City of Chicago (Board of Health), which shows that 32 rat holes were found in Mrs. Robinson's building. A crew of three men worked 3½ hours to plug the holes, using the poisons as shown on the work sheet.

The City's charge for this service was $5.00 per hour, per man. 10½ hours of labor were performed by the three men at the building site and a bill of $52.50 was sent to Mrs. Robinson. The $5.00 per hour charge for an exterminator is a reasonable fee. When Mrs. Robinson failed to pay this bill, a suit was filed against her and a judgment obtained.

It is our belief that the maintenance and care of a building is the responsibility of the owner and not the City of Chicago.

CAPACITY OF STRUCTURAL ENGINEERS

(Commissioner of Buildings—D. P.—July 31, 1967)

Your recent letter to Mr. Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for response. You have requested a clarification of Chapter 45, Section 45-2, of the Municipal Code of Chicago, which requires the signing and sealing of building plans by either an architect, a structural engineer, or a professional engineer. It has been suggested, you state, that the Department of Buildings should not approve building plans signed by structural engineers for buildings which they are not, under the statute regulating that profession, qualified to design; specifically, it is contended that the design of schools and apartment buildings by structural engineers is not permitted either by city ordinance or by state statute. Attached to your letter are copies of a letter from Mr. Gerald Palmer of the Illinois Society of Architects, and of an opinion of the Attorney General of Illinois.

It is the opinion of this office that engineers licensed under the Illinois Structural Engineering Act (Ill. Rev. Stat. 1965, ch. 131½, pars. 1-16), are not qualified under that Act to design structures such as schools and apartment buildings and building plans for those kinds of buildings, signed by such an engineer alone, should not be approved by your Department.

The Municipal Code of Chicago, Chapter 45, Section 45-2, provides, in part, that:

> "The person who signs and seals such plans shall be permitted to do so within the limitations of the particular act under which he is licensed to practice. . . ."

Therefore, apart from those situations where there may be a substantial overlapping in the statutory qualifications of licensed occupations, see *Aramburu* v. *City of Chicago,* 73 Ill. App. 2d 184 (1966), it is necessary for the Building Department to distinguish between the qualifications of architects and structural engineers and to limit accordingly their participation in the process of approving building plans. *Aramburu* v. *City of Chicago,* cited above, concerned a situation converse to that presented here: there it was argued that all building plans that include refrigeration plants, heating plants, etc., should require the approval of a professional engineer as well as that of an architect. Rejecting this argument, the court observed that the ordinance permitted approval ". . . either by an architect or, *in certain limited situations, by a structural engineer* or registered professional engineer. . . ." (73 Ill. App. 2d, 192). (Emphasis supplied.)

Under Section 2 of the Illinois Architectural Act (Ill. Rev. Stat. 1965, ch. 10½, par. 2), the object of the "practice of architecture" is:

". . . the construction of any private or public buildings, building structures, building projects, or addition to or alteration thereof."

The same Section of that Act goes on to define "buildings" as:

". . . any structure consisting of foundations, floors, walls, columns, girders, beams and roof, or a combination of any number of these parts, with or without other parts."

Unlike this broad, general definition, the definition of "structural engineering", under Section 2 of the Illinois Structural Engineering Act (Ill. Rev. Stat. 1965, ch. 131½, par. 2), is restricted and detailed, setting forth a list of specific structures that are within the Act. That paragraph permits structural engineers to deal with any of the listed structures.

". . . even though such structures may come within the definition of 'buildings' as defined in any Act in force in this State relating to the regulation of the practice of architecture."

Those structures are as follows:

". . . the structural part of edifices designed solely for the generation of electricity; or for the hoisting, cleaning, sizing or storing of coal, cement, sand, grain, gravel or similar materials; elevators, manufacturing plants; docks; bridges; blast furnaces; rolling mills; gas producers and reservoirs; smelters; dams; reservoirs; waterworks; sanitary works as applied to the purification of water; plants for waste and sewage disposal; round houses for locomotives; railroad shops; pumping or power stations for drainage districts; or power houses, ..."

It seems clear that the General Assembly, in using the exceptions listed above, intended to limit the kinds of buildings within the competence of structural engineering to those that are within the detailed list set out above. See *Aramburu* v. *City of Chicago, supra.* Schools and apartment buildings, it will be observed, are not within this list.

This view is, we believe, generally in accord with that taken by this office in an earlier opinion (Vol. 10, Opinions of the Corporation Counsel, 876). We were there concerned with whether the signature and seal of a structural engineer could ever validate a building plan; in the instant case we are concerned with the narrower question of what kinds of structures may be approved by structural engineers.

The position stated herein appears also to be in agreement with that of the Attorney General of Illinois, as expressed in an opinion issued December 30, 1920, and reaffirmed in an opinion dated December 8, 1961, a copy of which you have enclosed. The original opinion concludes, that the Illinois Structural Engineering Act.

". . . should be regarded as specifically and in terms limiting the practice of structural engineering *as to buildings* to the special structures named in *section two* of their act. . . ."

COMPETENCE OF ENGINEERS

(Commissioner of Buildings—D. P.—January 15, 1969)

In 1967, the Department of Buildings asked the Corporation Counsel to interpret Chapter 45, Section 45-2, of the Municipal Code of Chicago; specifically, a ruling was requested as to whether engineers licensed under the Illinois Structural Engineering Act (Ill. Rev. Stat. 1965, ch. 131½, pars. 1-16) were qualified under that Act to design structures such as schools and apartment buildings, and whether building plans for those kinds of buildings, signed by such an engineer alone, should be approved by the Department of Buildings.

In a letter dated July 31, 1967, this office answered your questions in the negative. We noted at that time that a comparison of the Illinois Structural Engineering Act and the Illinois Architectural Act (Ill. Rev. Stat. 1965, ch. 10½,

par. 2), indicated a distinction between "structures" and "buildings," the latter being within the statutory competence of structural engineers only insofar as they were specifically designated in the statute. We were supported in this interpretation by the Attorney General of Illinois in an opinion dated November 30, 1920, and reaffirmed in an opinion dated December 8, 1961.

After the release of our opinion of July 31, 1967, you forwarded to this office certain other statements of the Attorney General, and asked whether they provided a basis for reconsidering our position. Our assessment of those statements at that time was that they did not materially affect the prevailing interpretation of the Illinois Structural Engineering Act.

More recently, however, the Attorney General apparently rejected his prior interpretation of the relevant statutes: in an opinion dated December 9, 1968, he held that the term "structures" includes all kinds of buildings and, further, that there is no statutory limitation on the kinds of buildings within the competence of structural engineers.

While it is true that an opinion of the Attorney General lacks precedential value, we nevertheless believe that it should be accorded considerable weight in the absence of controlling judicial decisions. For that reason, and in the interest of achieving consistency in the interpretation and enforcement of these statutes, we now amend our opinion of July 31, 1967. Accordingly, your Department may accept building plans for buildings such as schools and apartment buildings that are sealed by structural engineers.

Section B. Zoning

SALE OF ALCOHOL

(Administrative Assistant to the Mayor—H. F. W.—April 17, 1969)

We wish to acknowledge receipt of your letter of March 24, 1969, in which you request an opinion as to whether alcoholic liquor for consumption on the premises may be sold by the above captioned establishment in a business located in an area zoned B3-1 General Retail District.

Section 8.3-3 of The Chicago Zoning Ordinance (Chapter 194A of the Municipal Code of Chicago) allows the establishment of uses permitted in Section 8.3-2, which, in turn, lists the following two uses among many others under the permitted uses in said zoning district:

(32) Liquor stores, package goods only.

(48) Restaurants, when no entertainment or dancing are provided. Liquor may be served if incidental to the serving of the food as the principal activity.

Under the foregoing provisions of the Chicago Zoning Ordinance it would be legal to conduct a liquor store for package goods only and to conduct a restaurant business which would serve alcoholic liquor by the drink for consumption on the subject premises only if incidental to the principal business of serving food.

The interpretation you are requesting is one which must be based upon a review of the facts after observing the operation of the above named premises. To determine if that operation is permitted under the B3-1 zoning classification, the issue to be determined is whether the sale of alcoholic liquor for consumption on the premises is in conjunction with the sale of package goods, or if said sale is incidental to the serving of food on the premises.

If it is determined that the bar facility is primarily operated for the sale of alcoholic beverages by the drink in conjunction with the sale of alcoholic beverages in the package goods section of the store, said use would be prohibited under the zoning ordinance.

If you determine, however, that the sale of package goods in one portion of the store is primarily a separate operation and that the sale of alcoholic liquor by the drink for consumption on the premises is incidental to the serving of food, said sale of alcoholic liquor by the drink may be a permitted use under said zoning classification even though a portion of the premises may be used for the sale of alcoholic beverages in the form of package goods only.

WHO MAY APPLY FOR APPEALS, VARIATIONS, SPECIAL USES

(Chairman, Zoning Board of Appeals—A. H.—August 10, 1967)

Your recent letters of August 4 and June 28, 1967, addressed to Raymond F. Simon, Corporation Counsel, concerning the adoption of rules of procedure that would include specific reference to requirements as to who may file applications for appeals, variations and special uses, have been referred to the undersigned for consideration and response. You state that the Zoning Ordinance makes no provision as to who may file such applications and you suggest that the Zoning Board of Appeals under Section 11.3-3 may adopt its own rules of procedure in this regard. The question postulated is one containing legal problems not so much from the standpoint of the Board's authority to make such rules, but rather with regard to which persons the Board intends to include in the category of permissible applicants. Therefore, we shall treat this problem with a somewhat extended consideration and analysis.

The section to which you refer, Section 11.3-3 of Article 11 of the Zoning Ordinance, provides, among other things:

> "The Board shall adopt its own rules of procedure not in conflict with this comprehensive amendment or with the applicable Illinois statutes, . . ."

Since the City and its agencies may exercise only those powers delegated to them by statute, reference must first be made to the statutory authority involved in the subject matter to which you refer, as follows:

1. *Appeals to the Board of Appeals.*

Section 11-13-12 of the Municipal Code of Illinois (Ill. Rev. Stat. 1965, Ch. 24, Par. 11-13-12) provides, in part:

> "An appeal to the Board of Appeals may be taken by *any person aggrieved* or by any officer, department, board or bureau of the municipality." (Emphasis supplied.)

Our Zoning Ordinance, Section 11.8-1, provides, in part:

> "An appeal may be taken to the Board of Appeals by any person, firm or corporation, or by any officer, department, board or bureau aggrieved by a decision of the Office of the Zoning Administrator."

In the past, the courts have construed the word "aggrieved," in the context of zoning matters, to include a group as wide as owners of property located in a neighborhood in which an applicant was given a permit to construct a building prohibited by ordinance (*Michigan-Lake Building Corp.* v. *Hamilton,* 340 Ill. 284), and to narrowly limit said group to those landowners whose property is located in the same zoning district as that in which the proposed property use is located who are not enjoying the same use sought by the applicant (*Winston* v. *Zoning Board of Appeals,* 407 Ill. 588). The *Winston* decision has subsequently been construed as requiring the putative aggrieved party to both assert and prove his interest in maintaining such an action, showing some adverse effect by the

decision upon his rights, privileges or duties (*222 East Chestnut Street Corp.* v. *Board of Appeals,* 10 Ill. 2d 130; *222 East Chestnut Street Corp.* v. *Board of Appeals,* 10 Ill. 2d 132; *Moran* v. *Zoning Board of Appeals,* 17 Ill. App. 2d 280; *Rosenfeld* v. *Zoning Board of Appeals,* 19 Ill. App. 2d 447). Although the foregoing cases deal with parties entitled to seek relief under the Administrative Review Act of Illinois (Ill. Rev. Stat. 1965, Ch. 110, Par. 264, *et seq.*), the general principle thus enunciated should be considered in determining who may be considered an "aggrieved person" under Section 11-13-12 of the Municipal Code of Illinois as well as under Section 11.8-1 of the Chicago Zoning Ordinance.

Accordingly, the rules which the Zoning Board of Appeals may adopt with respect to who may file an application for appeal should be written within the explicit and implicit intent of the statutory and ordinance provisions, as well as the case authorities, to which we have referred.

2. *Applications for variations.*

Section 11-13-4 of the Municipal Code of Illinois (Ill. Rev. Stat. 1965, Ch. 24, Par. 11-13-4) contains the authority delegated to municipalities of 500,000 or more population the power to vary zoning classifications, regulations and restrictions through application to the Zoning Board of Appeals. This section is silent with respect to who may apply for such a variation; however, among the qualifications and evidence required to be considered by the Board of Appeals is that which would tend to show that the plight of the "owner" is due to unique circumstances. The "owner" is not defined in the statute. The foregoing statutory scheme is carried into the ordinance provision set forth in Section 11.7-3 of the Zoning Ordinance which requires the Board of Appeals to make a finding based upon the evidence, among other matters, that the plight of the "owner" is due to unique circumstances, again with no definition of the word "owner."

Reference to the court decisions must therefore be made in an effort to ascertain who may be considered an owner under the terms of the statute and ordinance cited above. The Supreme Court of Illinois, in *People ex rel. Hart* v. *Village of Lombard,* 319 Ill. 56, has held the word owner to include one who has the "use, control or occupation of the land with claim of ownership, whether his interest be in absolute fee or a less estate." (See, also, 15 Op. Corp. Counsel 248). (*Cf., Babitzke* v. *Village of Harvester,* 32 Ill. App. 2d 289, in which the Appellate Court held that either the actual owner of the property involved or the holder of an option to purchase the property, even though said option was contingent upon successfully securing the variation, could rightfully apply for a variation). Other court decisions have held that the holder of an option contingent upon rezoning of property or a successful challenge to the validity of existing zoning does not have a sufficient interest in property upon which to apply for judicial relief (*Clark Oil & Refining Corp.* v. *City of Evanston,* 23 Ill. 2d 48; *Jans* v. *City of Evanston,* 52 Ill. App. 2d 61).

Prudence appears to dictate, in view of the above cited authorities, that from the standpoint of promulgating rules as to who may apply for a variation the Board of Appeals should require an application for variation to be made by the "owner," defined as such persons as have that trinity of interest which includes the "use, control or occupation of the land with claim of ownership," or by persons having a contractual interest in the land when joined in the application by the "owner" as defined above.

3. *Applications for variations in the nature of special uses.*

No statutory provision expressly authorizes variations in the nature of special uses; however, the Supreme Court of Illinois has held in a number of cases that the special use technique was a permissible extension of the variation authority delegated by the Legislature (*Lazarus* v. *Village of Northbrook,* 31 Ill. 2d 146; *Columbus Park Cong.* v. *Board of Appeals,* 25 Ill. 2d 65). It follows, therefore, that the same parties authorized to apply for variations under the statute may also apply for variations in the nature of special uses. Section 11.10-3 of the Zoning Ordinance authorizes applications for variations in the nature of special uses to be filed and processed in the same manner prescribed for applications for other variations.

Therefore, the proposed rules to which your letter refers, which would define those persons or entities who may apply for variations in the nature of special uses, should be drawn in consideration of the same statutory and ordinance provisions, as well as case authorities, to which we have referred in regard to applications for variations.

As in the past, this office will be happy to cooperate with the Zoning Board of Appeals in the promulgation of any rules about which you have made inquiry.

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

(Chairman, Zoning Board of Appeals—A. H.—February 26, 1968)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel, City of Chicago, regarding the Circuit Court determination on administrative review of the above-captioned case, has been referred to the undersigned for consideration and response.

You suggest that the Circuit Court, in reversing the decision of the Zoning Board of Appeals, went further than necessary or proper by directing the Board to enter an order granting a special use and variation in the above entitled application, stating your belief that this is a very unusual condition of an order which a Court has no right to enter. You ask to be advised as to the authority of the Board in such cases.

It has often been held that a Court may not substitute its judgment for that of an administrative agency, but must examine the record to determine whether the agency's findings and decision are supported by substantial evidence or are against the manifest weight of the evidence. See, *e.g., Morgan* v. *Zoning Board of Appeals,* 17 Ill. App. 2d 280. Although Section 12 of the Administrative Review Act (Ill. Rev. Stat. 1967, ch. 110, par. 275) has not been construed with respect to whether the Court on judicial review of an agency determination may order the agency to reach a specific conclusion, it would appear the better practice, as you suggest, that there be, in case of a reversal, the entry of an order of reversal with directions to the agency to proceed in conformity with the Court's determination. See, *e.g., Howard* v. *Lawton,* 22 Ill. 2d 331, 338-39. Nevertheless, the reports occasionally indicate approval of an order on administrative review which ". . . reversed the Board and ordered that the requested variance be granted and that a building permit be issued accordingly." See, *e.g., Brown* v. *Board of Zoning Appeals,* 21 Ill. App. 2d 273, 274, 280.

Whether the Court's order in the instant case properly or improperly directed the Zoning Board of Appeals to grant the special use and variation would not be controlling, however, and may be regarded as surplusage, as the following discussion will show.

You state your opinion that the Board was correct in its determination irrespective of the Circuit Court's reversal, observing that the Zoning Board of Appeals is an independent body, which, under the statutes, is required to use its best judgment in ordering cases and to establish its own rules. The independence of the Zoning Board of Appeals and the exercise of its best judgment are, of course, exceedingly desirable; however, the matter does not rest at that point, and, under the statutes, cannot end there since judicial review of all final determinations of the Zoning Board of Appeals is prescribed by statute (Ill. Rev. Stat. 1967, ch. 24, par. 11-13-13). This means that in the hierarchy of the system of review imposed by the Legislature, a Court has the responsibility of reviewing determinations of such boards and exercising the powers contained in Section 12 aforesaid, including reversal among other things.

The questions then arise as to what must be done and by whom after judicial review of an administrative determination results in reversal. An excerpt from an opinion of the United States Court of Appeals for the 7th Circuit in *Morand*

Bros. Beverage Co. v. *National Labor Relations Board,* 204 F.2d 529 (7th Cir. 1953), *cert. denied,* 346 U.S. 909, is helpful in this regard. There the Court stated (204 F.2d at 532):

> "Before considering the question of the substantiality of the evidence in support of the Board's findings of fact, which is, of course, the only question properly presented at this stage of these proceedings, we think it not unwise to recall a basic tenet in our federal system of administrative practice and review. The position of any administrative tribunal whose "hearings, findings, conclusions and orders are subject to direct judicial review, is much akin to that of a United States District Court. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 140, 60 S.Ct. 437, 84 L.Ed. 656. That is to say, it is the 'inferior' tribunal, whose decisions, both substantive and, in some instances, adjective, are subject to review and consequent approval or disapproval by the reviewing body. The full implication of this relationship is realized when, as here, the occasion arises for the reviewing court to state what it believes to be the substantive law applicable to a particular controversy but finds that the lower tribunal has not conclusively found the facts to which this law should be applied. The result then, in view of the rule that a reviewing court shall not enter initial findings of fact, is an order remanding the cause 'for further proceedings in conformity with the decision of this court.' The pronouncements of the reviewing court are then known in the vernacular as 'the law of the case', *i. e.,* they are the rules to govern the particular dispute at hand, unless, of course, the decision of the reviewing court is declared erroneous by a tribunal of competent jurisdiction holding a still more superior position in the judicial pyramid. *In such a situation it behooves the inferior arbiter to exercise great care that 'the law of the case' is applied to the facts of the case when they have been precisely determined by it. This is so even when it finds itself in well founded disagreement with its reviewer.*
>
> "There is a most salutary reason for our adherence to this doctrine. While we must take care that improper or ill-conceived decisions be held to a minimum, and, when they appear, be quick to supplant them with sound decisions, we must remember that the particular lawsuit must, at sometime, come to an end. It is conceivable, though admittedly highly improbable, that an individual piece of litigation could be bounced up and down endlessly, from trial to appellate court, merely because of the refusal of the lower body to apply the law as announced by the reviewing one. *In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to "the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate isued to them."* (Emphasis supplied.)

The implications of the foregoing language apply with full force to the instant matter. See also, *Protomastro* v. *Board of Adjustment,* 3 N.J. Super. 539, 67 A.2d 231.

Assuming, therefore, that the reviewing court in the instant matter after reversal merely remanded the cause to the Zoning Board of Appeals for further proceedings not inconsistent with its order, the Board would in nowise be free to ignore the mandate of the Court but would be bound by law to proceed in conformity therewith. Since special uses and variations can be allowed only by the Zoning Board of Appeals under Article 11 of the Chicago Zoning Ordinance, it is our opinion, absent circumstances requiring hearing of further evidence, that the Board is bound to note the reviewing court's mandate upon reconsideration, and enter a new determination designed to effectuate the letter and spirit of the Court order toward the end that the applications are ultimately allowed and the necessary permits issue.

We hope the foregoing will be of assistance to the Zoning Board of Appeals in continuation of its very important work.

EXHAUSTION OF LOCAL REMEDIES

(City Council—H. N. N.—April 24, 1969)

On April 24, 1969, the Illinois Appellate Court rendered an opinion reversing a judgment of the Circuit Court of Cook County which had held the Chicago Zoning Ordinance unconstitutional as applied to the subject property, located at 5253-65 South Cicero Avenue, Chicago, Illinois.

The property herein was zoned B4-1, Restricted Service District. On August 18, 1965, plaintiffs filed an application for an amendment to the Chicago Zoning Ordinance seeking to rezone the subject property B4-2, Restricted Service District. This request was denied. Subsequently, plaintiff filed an action for declaratory judgment requesting the right to erect four buildings, each containing three dwelling units on the ground floor. Dwelling units on the ground floor are prohibited in both B4-1 and B4-2 zoning classifications. The proposed use would be equivalent to and would require a R-4 General Residency District, zoning classification. The Answer of the City of Chicago, filed in the Circuit Court, requested that Court to strike and dismiss the complaint upon the basis that the plaintiff had not properly exhausted its available local remedies.

The Illinois Appellate Court, in a case of first impression, clarified the doctrine of exhaustion of local remedies so as to require a party to first present to the municipal authorities an opportunity to correct any alleged individual errors or hardships before seeking judicial redress. In its opinion the Court stated (Opinion p. 4):

> "The purpose of the judicial doctrine . . . requiring exhaustion of local remedies before seeking judicial relief is to give to the local authorities an opportunity to correct any error in the zoning classification or to remedy any unreasonable hardships imposed thereby before the aggrieved party enters into litigation."

The import of this case is that it is no longer possible for a property owner to judicially attack the constitutionality of the Zoning Ordinance, as applied to its individual property, unless and until the City Council of the City of Chicago is presented an opportunity to grant the specific relief requested judicially.

NATIONAL BRICK CO. v. CITY OF CHICAGO

(City Council—R. S. C.—February 21, 1968)

On February 19, 1968, the Illinois Appellate Court rendered an Opinion affirming a judgment of the Circuit Court of Cook County which had dismissed the amended complaint of the plaintiffs.

This was a declaratory judgment action brought against the City of Chicago to have certain portions of the zoning ordinance declared void as applied to the property owned by the plaintiffs. The plaintiffs sought to erect multiple dwelling apartment buildings on the property bounded by Touhy Avenue on the south, Howard Avenue on the north, Kedzie Avenue on the east and the western boundary of the city limits on the west. It was the plaintiffs' contention that the evidence they introduced before the Master overcame the presumption of validity in favor of the ordinance; that a decision of the Circuit Court of Cook County in a 1954 action was *res judicata* as to the present action; that the plaintiffs need not have exhausted their local remedies before bringing the instant action; and that the judgment of the Chancellor was against the manifest weight of the evidence.

The Appellate Court concluded that the plaintiffs had not exhausted their local remedies and that their suit was, therefore, premature. The Court stated (Opinion, p. 8):

> "We are not presented with a situation were the invalidity of a zoning regulation is raised as a defense to an enforcement action brought by the

local authorities. See *County of Lake* v. *MacNeal,* 24 Ill. 2d 253, 181 N.E.2d 85. The plaintiffs in the instant case not only seek to have the zoning ordinance applied to the subject property declared void, but also seek permission to erect apartment buildings on the subject property. It is neither the province nor the duty of the courts to assume the role of a zoning body and determine the most appropriate or suitable zoning for a parcel of land. *Fiore* v. *City of Highland Park,* 76 Ill. App. 2d 62, 221 N.E.2d 323. Plaintiffs must first seek the alteration of the zoning regulations from the local legislative authorities before asking the courts to intervene."

JURISDICTION FOR RECONSIDERATION AND REVIEW

(Chairman, Zoning Board of Appeals—A. H.—March 24, 1970)

We are in receipt of your recent correspondence attaching a document purporting to be a "Petition for Reconsideration and Review" of your decisions in the above-numbered applications, upon which you seek our advice.

An examination of the "Petition for Reconsideration and Review" reveals that the petitioners were the unsuccessful applicants for a variation and for an appeal before the Zoning Board of Appeals, which were denied on February 26, 1970. It appears that the intended office of the "Petition for Reconsideration and Review" is to secure from the Zoning Board of Appeals a rehearing upon the questions presented in each of those cases.

It is our opinion that the Zoning Board of Appeals is without jurisdiction to consider the "Petition for Reconsideration and Review." In *Pearce Hospital Foundation* v. *Illinois Public Aid Commission,* 15 Ill.2d 301, the Supreme Court held that the Commission, being a creature of statute, had no power to allow a rehearing unless authorized by statute, stating (p. 307):

> "Accordingly, it has been consistently held that an administrative agency may allow a rehearing, or modify and alter its decisions, only where authorized to do so by statute. (See: *People ex rel. Illinois Highway Transportation Co.* v. *Biggs,* 402 Ill. 401; *Illini Coach Co.* v. *Illinois Greyhound Lines, Inc.,* 403 Ill. 21.)"

In *Oliver* v. *Civil Service Commission,* 80 Ill. App.2d 329, the Illinois Appellate Court considered the same question with respect to the power of an administrative agency to entertain a petition for rehearing or reconsideration, holding, among other things (p. 334):

> "Plaintiff argues that the Commission has the inherent power to correct its orders, just as courts have continuing jurisdiction over their own decrees. On this basis he contends that the Commission could correct its order even though there was no specific provision in the rules or in the ordinance for rehearing. The law is clear, however, that regulatory agencies have no inherent powers. They are creatures of statute, vested only with those powers specifically conferred upon them by the Legislature and accordingly they may modify their decisions only where authorized to do so by statute."

More recently, the Illinois Appellate Court in *Klaren* v. *Board of Fire & Police Commrs.,* 99 Ill. App. 356, concluded that the Board had no jurisdiction to hear a petition to set aside its findings and order, and that review should be pursued through the provisions of the Administrative Review Act.

An examination of the appropriate provisions of the Illinois Municipal Code reveals that no authority has been delegated to a Zoning Board of Appeals to rehear, reconsider or review its decisions (see, *i.e.,* Ill. Rev. Stat. 1969, ch. 24, pars. 11-13-3; 11-13-4; 11-13-11; 11-13-12; and 11-13-13).

We would advise, therefore, that the "Petition for Reconsideration and Review" be returned to the petitioners with the advice that the Zoning Board of Appeals is without jurisdiction to consider or render a determination upon it.

ESTABLISHMENT OF SANITARY LAND FILL

(Chairman, Zoning Board of Appeals—H. F. W.—June 10, 1970)

We wish to acknowledge receipt of your letter of June 1, 1970 addressed to Mr. Richard L. Curry, Corporation Counsel of the City of Chicago in which you request an opinion as to whether the Zoning Board of Appeals has the authority to conduct hearings on applications for a variation in the nature of a special use for sanitary land fill operations.

In your letter you state that due to the recent enactment of the new Environmental Control Ordinance, Chapter 17 of the Municipal Code of Chicago, there appears to be confusion and conflict between the Department of Environmental Control and the Zoning Board of Appeals as to who has jurisdiction to hear applications for the establishment of sanitary land fill operations.

In order to operate a sanitary land fill business the proposed operator must obtain a variation in the nature of a special use from the Zoning Board of Appeals pursuant to the provisions of Chapter 194A of the Municipal Code of Chicago. This procedure applies to the zoning aspect of the real estate involved. After obtaining the special use, the proposed operator must obtain a permit from the Department of Environmental Control pursuant to the provisions in Chapter 17 of the Municipal Code of Chicago. This, in effect, is a license to conduct the business.

Sections 10.4-2 and 10.4-3 of the Chicago Zoning Ordinance provide that the Zoning Board of Appeals has the authority to permit, as a special use, areas for dumping or disposal of garbage, refuse or trash in districts zoned M2 and M3. Under the provisions of Sections 11.10-1 through 11.10-5, the Zoning Board of Appeals has the authority to hold hearings on applications for a variation in the nature of a special use. Under Subsection 4 of Section 11.2-3 of the Chicago Zoning Ordinance, the Zoning Administrator has the responsibility to maintain records of all special uses granted by the Zoning Board of Appeals.

Under the provisions of Chapter 17 of the Municipal Code of Chicago, the Department of Environmental Control has the responsibility of processing applications for permits to conduct sanitary land fill operations. Under the provisions of Sections 17.6-1 and 17.6-2 of Chapter 17, the applicant for a sanitary land fill permit must submit evidence of zoning approval to the Department of Environmental Control, along with his application for the sanitary land fill permit. The provision of Subsection 4 of Section 17.6-2 which requires approval by the Zoning Administrator, refers to the zoning use authorized by the Zoning Board of Appeals in granting a variation to permit the establishment of a sanitary land fill on a specific parcel. This is a prerequisite to the applicant filing for a permit with the Department of Environmental Control.

In answer to your specific question pertaining to the application now pending before your Board for the establishment of a sanitary land fill depository in an M3-3 Heavy Manufacturing District on the premises bounded by E. 119th Street, E. 120th Street, So. Luella Avenue and So. Crandon Avenue, we hereby advise you that this application is properly before the Zoning Board of Appeals and that the Board has the jurisdiction to conduct hearings on said application.

REVISION: RULES OF PROCEDURE

(Chairman, Zoning Board of Appeals—A. H.—January 15, 1968)

You have asked for clarification of the language contained in Article VI of the proposed Rules of the Zoning Board of Appeals.

It should first be noted that in working with Mr. George Kranenberg and Mr. Michael Jordan, who had been assigned to the Mayor's Committee for

Review of the Chicago Zoning Ordinance, the undersigned advised them that since the Rules were not reviewed as to form or language in their entirety, it would be premature to submit the proposed revised Rules of Procedure. The Rules submitted to you had, in fact, been tentatively revised, and then only through Article V. Significantly, the Rule to which you refer in Article VI had not been subjected to analysis and review to which we have referred; however, so as to complete the analysis and suggested changes, we make the following observations.

The language of Article VI as contained in the present draft does not accurately reflect the law. The enabling act, Section 11-13-3(E) of the Illinois Municipal Code (Ill. Rev. Stat. 1967, ch. 24, par. 11-13-3(E)), states, in part, as follows:

> "The concurring vote of 3 members of the board, in municipalities having a population of more than 500,000, . . . is necessary to reverse any order, requirement, decision, or determination of such an administrative official, or to decide in favor of the applicant any "matter upon which it is required to pass under such an ordinance or to effect any variation in the ordinance, or to recommend any variation or modification in the ordinance to the corporate authorities."

Thus it may be seen that the statute requires the concurring vote of 3 members only under specific instances, such as reversal of an administrative official's determination on appeal, or decision in favor of the applicant, or effecting any variation or modification in the Ordinance. It is not accurate to say that the concurring vote of 3 members of the Board shall be necessary "to render a decision," but rather to render only those decisions that fit categories suggested by the statute. Sections 11.7-4, 11.8-2 and 11.10-3 of the Chicago Zoning Ordinance as presently written do not hold otherwise.

Therefore, it is suggested that the second sentence of the proposed Article VI entitled "Final Disposition" be amended to read as follows:

> "The concurring vote of the members of the Board shall be in accordance with Sections 11.7-4, 11.8-2 and 11.10-3 of the Zoning Ordinance and Section 11-13-3(E) of the Illinois Municipal Code (Ill. Rev. Stat. 1967, ch. 24, par. 11-13-3(E)) shall be necessary to reverse any order, requirement, decision or determination made by an administrative official charged with the enforcement of the Zoning Ordinance, or to decide in favor of the applicant any matter upon which it is required to pass under such an ordinance or to effect a variation in the ordinance, or to recommend any variation or modification in the ordinance to the corporate authorities."

We have no suggested changes with respect to Article VII of the Rules, however, upon reconsideration of the entire set of Rules, the following suggestions are made.

The paragraph entitled "Voting" under Article I of the Rules should be amended by inserting the words "of the Illinois Municipal Code" after "Section 11-13-3(E)" which appears in the first sentence.

The paragraph entitled "Order of Procedure" under Article V, subparagraph (7) of the Rules should be amended by adding the words "objector or" following the words "cross-examination of" as presently appears in said sentence.

It is suggested that the provisions relating to depositions under Article V do not entirely reflect current legal thinking as exemplified by Illinois Supreme Court Rules 202 through 212. Therefore, it is suggested that the sentence under the heading "Depositions" be amended as follows:

> "The Board may authorize the taking of depositions either upon its own motion, or upon good cause shown, in accordance with the Rules of Practice set forth in Illinois Supreme Court Rules 202 through 212."

ENVIRONMENTAL QUALITY OF THE CHICAGO RIVER

(Commissioner, Department of Public Works—A. H.—February 13, 1969)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel, requesting the Law Department to become involved in a program to improve the environmental quality of the Chicago River, particularly with respect to the enforcement of existing zoning ordinances, has been referrred to the undersigned.

Your letter states that on-site field surveys reveal the existence of numerous, flagrant, environmental blighting conditions and you ask for development of legal justification that would assist the implementation of the riverfront improvement program.

Appropriate proceedings for the correction of zoning ordinance violations are contemplated in Article 11, Section 11.2-2 of the Chicago Zoning Ordinance, wherein the Bureau of Zoning of the Building Department, through the Zoning Administrator, is directed to enforce the provisions thereof, which reads, in part, as follows:

> "The Zoning Administrator shall enforce this comprehensive amendment, and in addition thereto and in furtherance of said authority he shall:
>
> ". . . .
>
> "(3) Conduct inspections of buildings, structures, and uses of land to determine compliance with the terms of this comprehensive amendment;"

The Zoning Administrator's Office, thus charged with the responsibility of enforcing the terms of the ordinance, and possessing the field staff necessary to conduct inspections of buildings, structures and uses of land, should be apprised of any zoning violations that have come to the attention of your Department. Upon finding such a violation, the Office of the Zoning Administrator should draw charges and specifications and forward the same to the Corporation Counsel for enforcement action. In this way, the factual circumstances in which the alleged violations are taking place can be investigated, documented and proven in a court of law with an appropriate remedy imposed by the court as required.

We are taking the liberty of forwarding a copy of this letter to the Commissioner of Buildings, Joseph F. Fitzgerald, and to the Zoning Administrator, John P. Maloney.

CHURCH IN A RESTRICTED SERVICE DISTRICT

(Commissioner of Buildings—A. H.—August 15, 1967)

Your recent letter addressed to Honorable Raymond F. Simon, Corporation Counsel, in which you request an opinion with respect to the use of the above-designated premises as a church, has been referred to the undersigned for consideration and response.

You state that the subject premises were illegally occupied by a store front church until August 1, 1967, on which date said church was partially destroyed by fire and the windows boarded. On August 9, 1967, the former occupant made application to the Building Department for a permit to repair and remodel the church, which application was denied by the Zoning Administrator for the reason that a church cannot be located in a B4-1 Restricted Service District, the zoning which applies to said property. You advise us that the applicant and his attorney have informed you that they had a legal right to occupy the premises as a church, stating that they came within the opinion rendered by the Supreme Court

of Illinois entitled *Columbus Park Congregation of Jehovah's Witnesses, Inc., et al* v. *Board of Appeals of the City of Chicago,* 25 Ill.2d 65. You ask for a legal evaluation of the applicant's contention so that you may either refuse or affirm the permit application.

Article 8 of the Chicago Zoning Ordinance (Municipal Code of Chicago, ch. 194A), contains the provisions applicable to permitted and special uses which may be established on property zoned within the Business District category. Churches are not permitted uses, but have been designated special uses in a 14.1 Restricted Service District, as shown in Sections 8.4-1(2), 8.4-3(1) and 8.4-4(1). Article 11, Sections 11.10-1 through 11.10-5, sets forth the procedures which must be followed in applying for and establishing special uses, including an application (Sec. 11.10-3) and pertinent standards governing said establishments (Sec. 11.10-4).

The foregoing provisions, wherein churches in Business Districts may be established only by following the special use procedures set forth above, were upheld in the *Columbus Park Congregation* case, *supra,* in which the Columbus Park Congregation of Jehovah's Witnesses had applied for a special use, which was denied under the evidence presented to the Board of Appeals. The Supreme Court reversed the decision of the Zoning Board of Appeals only upon the evidence presented in the record, stating (25 Ill.2d at 73):

> "*Based upon the evidence in this record,* we believe that the denial of a special use permit to plaintiffs is arbitrary and capricious and bears no substantial relation to the public health, safety and welfare. Plaintiffs have, therefore, been denied their constitutional rights *in this case.*
>
> We have reached this conclusion *on the basis of the evidence presented,* and therefore need not consider other allegations of unconstitutionality. . . ." (Emphasis supplied.)

Other cases in Illinois have held that a municipality may regulate the location of churches where such regulations are reasonably related to the public health, morals, comfort, safety or welfare. *Housing Authority of Gallatin County* v. *Church of God,* 401 Ill. 100; *O'Brien* v. *City of Chicago, etc.,* 347 Ill. App. 45. In other jurisdictions, reasonable municipal zoning regulations of churches have been upheld. *Presiding Bishop of Church of Jesus Christ of Latter Day Saints* v. *City of Porterville,* 90 Cal. App.2d 656, 203 P. 2d 823; *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 380; *Miami Beach United Lutheran Church* v. *City of Miami Beach,* 82 So. 2d 880 (Fla. Supreme Ct.); *Milwaukee Co. of Jehovah's Witnesses* v. *Mullen,* 214 Ore. 281, 330 P.2d 5; *Galfas* v. *Ailor,* 81 Ga. App. 13, 57 S.E. 2d 834; *Allendale Congregation of Jehovah's Witnesses* v. *Grosman,* 30 N. J. 273, 152 A. 2d 569; *Appeal of Trustees of Congregation of Jehovah's Witnesses,* 183 Pa. Super. 219, 130 A. 2d 240. From the foregoing authorities, we conclude that the special use technique, whereby churches are classified as special uses in Business Districts, as provided in the Chicago Zoning Ordinance, is valid and constitutional.

With respect to the application pending before you for establishment of a church at 7218 S. Ashland Avenue, we suggest that an investigation be made for the purpose of ascertaining when the store was first occupied by the church. If it was established on or before May 29, 1957, the date on which the Comprehensive Amendment to the Chicago Zoning Ordinance was adopted, it may be considered a legal special use under Article 5, Section 5.10, since, under the 1942 Comprehensive Amendment, churches were permitted uses in Business Districts, as set forth in Sections 5(2), 8(1), 9(1) and 10(1) of that Amendment. In the event, however, said use of the premises was not so previously established, then the applicant church must apply to the Zoning Board of Appeals for a variation in the nature of a special use as provided by the pertinent sections of Article 11 of the present Chicago Zoning Ordinance.

SELF-SERVICE LAUNDRIES

(Commissioner of Buildings—A. H.—April 30, 1968)

This is to advise your Department that the above cited case has been dismissed and the injunction vacated, which had restrained the City of Chicago and its officials from enforcing Sections 121-13.1 through 121-13.6 of the Municipal Code of Chicago, regulating self-service, coin-operated dry cleaning establishments.

As you will note from the ordinance provisions aforesaid, among the requirements relating to said establishments are that they must comply with Municipal Code Sections 60-25 and 81-7, as well as applicable provisions of Chapter 99 and of the Chicago Zoning Ordinance (Section 121-13.1). Also required is that persons establishing dry cleaning stores of the coin-operated, self-service type must submit to the Commissioner of Buildings for approval a complete set of plans and specifications of the building in which the establishment is to be located, etc. (Section 121-13.4). The above cited measures are such as would require enforcement by the Building Department, which we herewith respectfully request.

The cooperation of the Building Department in this matter will be greatly appreciated.

FIRE STATION IN TWO ZONING DISTRICTS

(Commissioner, Department of Public Works—H. F. W.—July 22, 1970)

We wish to acknowledge receipt of your letter of July 20, 1970 addressed to Mr. Richard L. Curry, Corporation Counsel of the City of Chicago, in which you request an opinion as to whether the construction of a fire station on a site located partially in a B-4 Restricted Service distrtict and partially in an R-3 General Residence district, requires a variation from the Zoning Board of Appeals. You attached a copy of a blueprint and two sketches to your letter which we, herewith, return to you.

Under the provisions of Section 7.3-4 of the Chicago Zoning Ordinance, as amended, Chapter 194A of the Municipal Code of Chicago, fire stations are not listed as permitted uses in an R-3 General Residence distrtict. Under the provisions of Sections 7.4-3 and 7.4-1 of the Chicago Zoning Ordinance, fire stations are listed as special uses in an R-3 General Residence district. Under the provisions of Section 8.3-4 of the Chicago Zoning Ordinance, fire stations are listed as permitted uses in B-4-1 to B-4-5 Restricted Service districts.

In order to obtain zoning approval for the proposed new construction, the Fire Department should file an application for a variation in the nature of a special use with the Zoning Board of Appeals.

HELIPORT NEAR RESIDENTIAL DISTRICT

(Commissioner, Department of Development and Planning—A. H.—October 14, 1969)

Your request for an opinion relating to a proposed heliport to be established within the boundaries of Residential Planned Development No. 30 has been referred to the undersigned for consideration and response. You state that the

proposed heliport would be owned, operated and maintained by the City of Chicago for the use of hospital facilities within the Medical Center Distrtict, but that the land use controls for said Planned Development do not specifically permit or prohibit the establishment and location of a heliport. You ask whether it is within the jurisdiction of the Commissioner of Development and Planning to administratively review and permit the establishment and location of a heliport within a Planned Development which has institutions as its major land uses.

Upon careful consideration of the Chicago Zoning Ordinance provisions, we must conclude that heliports are specific property uses which are of such a unique character not only as to be excluded from all residential districts, but allowed to be established as special uses in business, commercial and manufacturing districts only after a hearing by the Zoning Board of Appeals and upon fulfillment of the strict and rigid standards applicable thereto. The City Council, in having so provided, appears to have considered heliports to be principal rather than accessory uses and to be entirely inconsistent with residential districts.

From the foregoing we are therefore unable to find jurisdiction in the Commissioner of Development and Planning for establishing heliports within a Planned Development administratively. It is our further opinion that because the Planned Development to which you refer is a medical center and the heliport would no doubt be used in conjunction with the transport of patients to and from institutions therein situated, some on an emergency basis, it appears appropriate that an amendment to Planned Development No. 30 be submitted for direct City Council approval for a use as beneficial as a heliport in this location would appear to be.

MINING OF SAND

(Commissioner, Department of Streets and Sanitation—A. H.—March 24, 1970)

We have your recent letter in which you relate that the Calumet Land Reclamation Company is engaged in the process of "mining sand" on their property and you state that you find no ordinance which requires a permit for the removal of sand, dirt or clay. You question the City's authority to prohibit the mining of sand.

"Mining of sand" appears to fall within the ambit of an operation described by the Chicago Zoning Ordinance as the "extraction of gravel, sand or other raw materials," which may be carried on only as a special use on property zoned M2-1 through M3-5 General Manufacturing and Heavy Manufacturing Districts, respectively (Chicago Zoning Ordinance, Municipal Code of Chicago, Ch. 194A, Sections 10.4-2(3); 10.4-3(1)), and which is subject to approval by the Zoning Board of Appeals.

Under the terms of the Zoning Ordinance, a property use which has been established prior to the adoption of the ordinance, which is made a special use by the terms of the ordinance, may be continued as a legally existing special use, subject to certain terms and conditions. (Chicago Zoning Ordinance, Municipal Code of Chicago, Chapter 194A, Section 5.10.)

Accordingly, it is our opinion that the City of Chicago can regulate a property use which contemplates the "mining" or extraction of sand under the terms of the Chicago Zoning Ordinance, which makes it a special use, subject to Zoning Board approval, and we advise that an investigation be requested of the Zoning Administrator, who has jurisdiction in such matters, to determine whether said business being carried on by Calumet Land Reclamation Company is legal or otherwise, and to take such appropriate steps as may be indicated.

LOCATION OF MOTOR VEHICLE SALES ROOMS

(Corporation Counsel, Decatur, Illinois—D. P.—July 9, 1969)

You have asked this office to identify the legislative grant of authority supporting sections 156-11 and 156-12 of the Municipal Code of Chicago, regulating the location of motor vehicle sales rooms. In addition, you have asked whether other ordinances of the city license, tax or regulate the used car business.

The operative provision to which you refer, section 156-12, both requires a frontage consent and prohibits construction of motor vehicle sales rooms (defined in section 156-11) within 200 feet of specified uses. Recent court decisions in Illinois have disapproved frontage consent provisions which leave ultimate determination of the public welfare to individuals rather than to the corporate authorities, e.g., *Drovers Trust & Savings Bank* v. *Chicago,* 18 Ill. 2d 476; *Rasmussen* v. *Village of Bensenville,* 56 Ill. App. 2d 119. The frontage consent provision of section 156-12 would seem to fall in this category.

The situation is different, however, with respect to the 200-foot distance restriction. The Illinois Municipal Code, Illinois Revised Statutes 1967, Chapter 24, paragraph 11-13-1 (4), gives to municipalities the authority

> to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential, and other uses. . . .

It should be noted, further, that the ordinance is applicable only to premises admitting motor vehicles and is designed to protect schools, churches and hospitals. These institutions are ordinarily centers of high public congestion and thus needful of special concern for traffic safety. They are needful as well of protection from the noise of motor vehicle engines. The purpose of the locatiton restriction in section 156-12, and the means to effect it, would therefore seem to be proper and reasonable, see *Bulk Petroleum Corp.* v. *Chicago,* 18 Ill. 2d 383; *Rasmussen* v. *Bensenville,* 56 Ill. App. 2d 119.

There are no other ordinances which license, tax, or otherwise regulate motor vehicle sales rooms, with the exception of sections 156-2, and 156-3, which deal generally with health and safety measures.

APPLICABILITY OF ZONING ON MULTIPURPOSE COMPANY

(Zoning Administrator, Department of Buildings—A. H.—September 28, 1967)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel, concerning the applicability of the Zoning Ordinance to a use proposed for the above described premises, has been referred to the undersigned for consideration and response.

You have enclosed a copy of a letter from W. J. Saunders and Company, Inc., of 617 W. North Avenue, which seeks permission to erect a building to contain approximately 11,000 to 12,000 square feet of floor area, in conformity with all other code provisions, said structure to be devoted to retail and wholesale dispensation of stationery supplies; warehousing of stationery and office equipment; and manufacture and processing of printed and engraved specialty items. You note that the premises are presently contained within an M3-3 Heavy Manufacturing District, which, under the Chicago Zoning Ordinance, does not appear to permit all of the proposed uses therein, and at the request of

Michael J. Stoken, Director of Industrial Development of the Mayor's Committee for Economic and Cultural Development, you ask for an opinion as to your responsibility in this matter.

The Saunders Company letter, which is signed both by the president of the company and an agent for the prospective seller of the land, contains the assertion that the present location of said company at 617 W. North Avenue is situated within the Clybourn-Ogden Urban Renewal Redevelopment Project and that its present property will eventually be subject to at least a partial taking, which would require relocation of said enterprise. Other information in the letter includes the following: that this company was established in 1936; that the proposed location is crucial to the company in that 80% (over $400,000.00 annually) of their market is provided by companies in said industrial area; that the small size of the subject tract has thus far precluded its use for more typical M3-3 uses; and that the proposed construction would be an aesthetic contribution to the area.

It appears from the Saunders letter that theirs is a multipurpose company in which are integrated business, commercial and manufacturing aspects, raising the difficulty of enabling such a company to establish itself on property suitably zoned for all such purposes. It also appears that the Saunders Company is seeking to establish on the subject property less intensive uses than those presently permitted; however, it appears that a majority of the proposed uses would be permitted thereon. For example, in Section 10.3-3 of the Chicago Zoning Ordinance, which lists uses permitted in an M3-1 to M3-5 Heavy Manufacturing District, subparagraph (2) includes as a permitted use any use permitted in the M1-1 to M1-5 Restricted Manufacturing District. Referring to Section 10.3-1 of said ordinance, which contains those uses permitted in the M1-1 to M1-5 Restricted Manufacturing District, subparagraph (8) permits the establishment of drug stores, in which one may anticipate the sale of stationery at retail (one of the uses proposed herein); subparagraph (16a) thereof permits storage, warehousing and wholesale establishments (another of the uses herein proposed); and subparagraph (1) thereof permits production, processing or storage of materials, goods, or products (of which manufacturing and processing of printed and engraved items are among the proposed uses).

It should also be noted that Ashland Avenue, the western boundary of the subject property, is the dividing line between the M3-3 Heavy Manufacturing District, in which the property is contained, and a C1-2 Restricted Commercial District to the west, in which many of the activities proposed to be established on the subject property would also be permitted.

On September 27, 1962, this office wrote an opinion addressed to you describing somewhat similar circumstances relating to establishing a retail department store in an M1-1 Restricted Manufacturing District. On August 30, 1965, this office wrote an opinion, also addressed to you, relating to similar circumstances with respect to property partially zoned M2-2 General Manufacturing District and C1-1 Restricted Commercial District. On June 22, 1966, this office wrote still another opinion concerning property in which several factors were involved, wherein property was zoned M1-3 Restricted Manufacturing District under which certain uses proposed would not be permitted, but others would. In each of these instances above described were contained many elements present in the instant case and all were intended for development in the best interests of the City.

Therefore, it is our opinion that an application by W. J. Saunders and Company, Inc., for construction of the proposed building to house the uses set forth in the Saunders letter, would be substantially in conformity with the zoning restrictions applying to the subject property and should be processed, and permits and zoning certificates issued, provided all other regulations are met.

CONTINUANCE OF NON-CONFORMING USE BY NEW OWNER

(Alderman, 41st Ward—A. H.—March 4, 1969)

We have your recent letter in which you describe an existing office building at 6117 W. Touhy Avenue, alleged to be located within an R1 Single Family Residence District. You ask whether the City would require the existing tenant, who wishes to purchase said building, to conform to said R1 Single Family Residence District zoning after he becomes the owner thereof.

Please be advised that the property to which you refer is actually located in an R2 Single Family Residence District, as shown in Map No. 17-M, Page 15B of the Chicago Zoning Ordinance. The issue raised in your letter, however, would be the same, since neither district permits the establishment of an office use such as you describe.

Article 6 of the Chicago Zoning Ordinance, however, contains those provisions which govern nonconforming buildings, structures and uses. Section 6.2 thereof authorizes the continuance of any nonconforming use which existed lawfully at the time of the adoption of the 1957 Comprehensive Amendment, subject to the regulations which follow that provision. The purchaser of property thereby affected enjoys the same rights and bears the same burdens as his grantor. See, *e.g., Forbes* v. *Hubbard,* 348 Ill. 166, 176.

Your letter states that the nonconforming use was established 40 years ago, which would be in about 1929. An examination of the 1923 Chicago Zoning Ordinance, then in effect, reveals that this area was not located within the City of Chicago at that time and we would be unable to state whether said use "existed lawfully" or was constructed illegally *ab initio* without further investigation.

Assuming that the use was lawfully established, however, it could be continued by its present owner or by any new owner for the length of time particularly applicable to the building under the terms set forth in Section 6.4-8 of the Chicago Zoning Ordinance, the amortization provisions.

Therefore, to the extent that the structure and use you describe "lawfully existed" at the time the 1957 Comprehensive Amendment was adopted, and to the extent said building falls within the terms of Section 6.4-8, depending upon its valuation and construction, your constituent, "standing in the shoes" of the present owner, could continue the present use of the property, and would be subject to the R2 Single Family Residence provisions upon the expiration of the pertinent amortization period therein set forth.

BUILDING PERMITS FOR NURSING HOMES

(Commissioner of Buildings—H. F. W.—September 21, 1970)

We wish to acknowledge the receipt of your letter of August 26, 1970 addressed to Mr. Richard L. Curry, Corporation Counsel of the City of Chicago, in which you request an opinion as to what action your department should take on pending applications for building permits for nursing homes. You request this opinion because of the recent zoning ordinance amendment which reclassified nursing homes located in an R4 through R8 Residential District from permitted uses within those districts to special uses.

In your letter you also request an opinion as to whether persons, who had filed their application and supporting documents with your department prior to the effective date of the zoning ordinance amendment, are exempt from the special use provision and are entitled to the issuance of a permit where the processing of the application for a permit had not been completed as of the effective date of the ordinance amendment. The questions you raised pertain to facts rather than law.

The decisions to be made on the pending applications are administrative and should be made by your department after considering the rules of law applicable and reviewing the factual situation of each case. The Courts have consistently repeated the general rules which apply to the subject matter and these are as follows:

1. A property owner does not have a vested right in the continuation of any specific zoning classification.

2. The right to zone and rezone property is a legislative function.

3. A municipality has the right to change a zoning classification.

4. A municipality may withhold the issuance of a permit while a comprehensive zoning ordinance amendment is pending before its legislative body.

5. A person who has acted in reliance upon an existing zoning classification and has substantially changed his position in reliance on said zoning classification is entitled to proceed with his project and the municipality in that case may be estopped from enforcing the new zoning classification where it would be highly inequitable or oppressive to do so.

6. The rights of the parties are fixed at the time an application for a building permit is made.

7. A municipality may not suspend an existing zoning ordinance by a resolution.

8. A property owner cannot complain about a change in zoning unless he has substantially changed his position in reliance on the present zoning.

9. A municipality's wrongful act cannot prevent a property owner from acquiring a vested right.

In *Naumovich* vs. *Howarth,* 92 Ill. App. 2d 134 the Court reviewed the rules of law stated above and listed four factors which should be considered in applying the above laws in order to determine the status of an applicant. The Court stated that in order to determine the status of an applicant these rules should be applied after considering the following four factors:

1. Has there been a substantial change of position on the part of the applicant before an orderly change in the law.

2. Has there been a notice of likelihood of change in the law prior to the change in the position of the applicant.

3. Has the proceeding of the municipality in making the zoning change amendment been regular and proper, and

4. Has the municipality acted promptly in the enactment of the zoning change.

The mere filing of an application for a building permit for the construction of a nursing home prior to the reclassification of a nursing home from a permitted use to a special use does not confer a vested right to the issuance of a building permit to said applicant. In order for said person to be entitled to the issuance of his building permit in accordance with the former permitted use classification that person must have substantially changed his position in reliance upon the zoning classification in effect at the time he filed his application. The Courts have defined a substantial change of position to be more than a minor dollar expenditure. The Courts have held that in order to determine whether a person has substantially changed his position an inquiry must be made into the facts of each situation.

For example, if a person applied for a building permit to construct a nursing home in an R 4 to R 8 Residential District on August 18, 1970, that fact in itself does not constitute a substantial change of position in reliance upon the existing zoning. To determine if such person has substantially changed his position in reliance on the existing zoning your department should consider all of the facts pertaining to said project such as:

1. Has he owned the property for a considerable length of time.

2. Has he actually purchased the property or is his purchase subject to obtaining approval.

3. Is his purchase subject to obtaining a building permit.

4. What actual expenses has he incurred such as architectural fees, payments against the purchase price, loan closing costs, and

5. What commitments has he obligated himself for such as mortgage financing charges, construction contracts, materials purchased, and etc.

If after reviewing these facts you determine that the applicant has substantially changed his position in reliance on the existing classification you then should complete the processing of his application and issue the building permit even though the zoning ordinance amendment which reclassified his proposed nursing home use from a permitted use to a special use was enacted shortly after he applied for his building permit.

This requirement of a substantial change in reliance on the former zoning would not apply in the case where an operator of an existing nursing home filed an application for a building permit which pertained to making necessary changes in order to bring his building in conformity with the building code. Such existing nursing home would remain a permitted use in said districts even though in order for someone else to establish a new nursing home in an R 4 through R 8 District said party would be required to file an application for a special use. The zoning ordinance amendment passed on August 24, 1970 does not require the operators of existing nursing homes located in R 4 through R 8 Districts to apply for special uses in order to continue their operation.

The questions you have raised in your letter relate to factual determinations which must be made by your department. If you determine that the applicant is requesting a new facility and that he has not substantially changed his position in reliance on the existing zoning, then you should deny his application for a building permit and suggest that he apply for a variation in the nature of a special use. If you determine that the applicant has substantially changed his position prior to the effective date of the zoning ordinance amendment, then your department should complete the processing of the application for a building permit and issue said permit even though said use has been reclassified to a special use.

RESIDENTIAL CARE HOMES

(Commissioner of Buildings—A. H.—May 21, 1969)

Your recent letter addressed to Corporation Counsel Raymond F. Simon has been referred to the undersigned. You advise that your Department presently has 38 applications pending before the Zoning Administrator for the issuance of licenses to operate "Residential Care (Half-Way) Homes," said applications being for premises located within Residential, Business and Commercial Districts. You state that the Zoning Ordinance makes no provision or reference to this type of use and ask for our opinion as to the proper zoning classification therefor.

Although our examination of the Chicago Zoning Ordinance reveals that no specific reference or provision is made for Residential Care (Half-Way) Homes per se, our analysis of the existing provisions relating to similar types of property uses reveals an apparent legislative intent to provide for appropriate zoning controls of this type of use in a generic sense although not specifically mentioned.

Under the definition of "Residential Care (Half-Way) Home," adopted December 13, 1968, by the City Council, any private boarding home, institution, building, residence or other place, whether occupied for profit or not, which through its ownership or management provides residential care, meaning maintenance and watchfulness, to three or more persons who are not related to the applicant or owner by blood or marriage is a "Residential Care (Half-Way) Home" under Chapter 136.2, Section 136.2-1 of the Municipal Code of Chicago.

The Chicago Zoning Ordinance contains definitions of property uses quite similar in nature and scope to the "Residential Care (Half-Way) Home." For example, a "rest home or nursing home" is defined under Section 3.2 of the Ordinance as private homes for the care of children or the aged or infirm, or a place of rest for those suffering bodily disorders, not containing equipment for surgical care or for the treatment of disease or injury. Rest homes or nursing homes are permitted uses in R4 through R8 General Residence Districts, under Sections 7.3-4(11); 7.3-5; 7.3-6; 7.3-7; and 7.3-8. We note, further, that hospitals, sanitariums and convalescent homes are also permitted uses in the R4 through R8 General Residence Districts, under Section 7.3-4(6), *et seq.* None of the three last described uses are defined within the Chicago Zoning Ordinance; however, words must be given their common dictionary meaning or commonly accepted use unless otherwise defined by the legislative body, the specific meaning to be determined by the object sought to be accomplished. See, *e.g., Bowes* v. *City of Chicago,* 3 Ill.2d 175, 201. The commonly accepted or dictionary meaning found in Webster's Third New International Dictionary, Unabridged (1968) defines "convalescent home," for example, as "an institution for the care of convalescing patients," and defines "convalescent" as one "recovering from sickness or debility: partially restored to health or strength." It thus appears that "Residential Care (Half-Way) Homes" could fall into the category of either a "rest home" or a "nursing home" as defined by the Chicago Zoning Ordinance, or a "convalescent home" as that term is commonly understood and accepted in accordance with its common dictionary meaning.

We have reviewed the authorities bearing upon this subject in general and find agreement that where zoning ordinances do not provide by name for uses similar in nature to those specifically permitted, the ordinance should be read so as to permit the type of use allowed, whether named or not, unless specifically prohibited. Thus, in *P. B. M. Construction Corp.* v. *Welsh,* 89 N.J. Super. 460, 215 A.2d 382, the Court was faced with an application to operate a nursing home in a residential district which made no provision for such home, but permitted "boarding houses" and "hotels" within that zone. The Court reviewed the authorities and concluded (215 A.2d at 385):

> "I am impressed with the similarity between the Belleville zoning ordinance and the zoning ordinance in Shegda. However, I am even more impressed with the reasoning behind such a determination. It seems to me that the purposes for establishing a nursing home are the same as the purposes for establishing a boarding house and hotel. They both provide lodging and meals for compensation. They both require extra public services. They both present similar traffic and parking problems and they both appeal to transient guests. The mere fact that nurses may be regularly on duty in a nursing home does not take it out of the category of boarding house or hotel, since any boarder in a boarding house or patron in a hotel could provide for the services of a nurse while staying at a boarding house or hotel, if he or she so desired.
>
> "It is my judgment that there could be no reasonable basis for allowing hotels and boarding houses and eleemosynary institutions and not allowing private nursing homes in a C residence zone of Belleville."

In *Shegda* v. *Village of Lancaster,* 192 Misc. 560, 80 N.Y.S.2d 517, the operation of a convalescent home was held to be authorized under an ordinance which permitted the operation of "hotels, rooming or boarding houses." The Court in so holding stated (80 N.Y.S.2d at 519-20):

> "The defendant argues:
>
> > 'It is not hard to understand that the constant going and coming of patients at the said homes, the extra parking hazards, the extra public services and private services required for the operation of such an establishment and the very transitory nature of the business is such that the same is undesirable in a residential neighborhood.'
>
> "In my judgment, what the defendant emphasizes could occur in connection with a hotel or any boarding house. Yet the ordinance permits the

erection and construction of hotels and boarding houses and use of buildings as such. Nor is the use of this building as a convalescent home more of a transitory nature than a hotel or any boarding house.

"It is quite frequent for doctors to recommend to people who are recovering from serious illnesses or operations that they leave the hospital for further convalescence before resuming the duties of their usual occupations. Primarily, they go to these homes to rest and recuperate. They differ in a very small degree from ordinary boarders. The fact that a nurse is on the premises to render any necessary service is not sufficient to take the proposed convaslescent home of the plaintiffs out of the category of a boarding house. An ordinary boarder could become so ill that he or she might need a nurse in attendance for some period of time."

In *Crain* v. *City of Louisville,* 298 Ky. 421, 182 S.W.2d 787, a nursing home was held to be a permissive use, although not specifically permitted by name. In so holding the Court noted (182 S.W.2d at 790):

"Hospitals are permitted in the zone before us. Like courts, hospitals are relative—they differ greatly in kind and character. Thus, there is the Supreme Court of the United States on the one extreme and a court of the Justice of the Peace in a backwood, rural community on the other. Each is a court. But whether appellant's institution be regarded strictly as a hospital or not, it has the attributes of both a hospital and a boarding and lodging house. While perhaps it could not be characterized as either exclusively, it is certainly something in between the two establishments and, as the ordinance permits use for either purpose, it must be construed as permitting use of an institution that is between the two in character, for the extremes include the mean."

See, also, *City of Gulfport* v. *Daniels,* 97 So.2d 218.

We find no reported decision in Illinois specifically dealing with the particular problem at hand; however, we draw upon the principle enunciated by the Illinois Supreme Court in *Suburban Ready-Mix* v. *Village of Wheeling,* 25 Ill.2d 548. In this case the Village of Wheeling purported to exclude and prohibit ready-mix concrete businesses within its boundaries. The Supreme Court, emphasizing that such a business was otherwise lawful and was not incompatible with other uses permitted in an industrial district, held (25 Ill.2d at 552):

"Under the applicable provisions the Village is authorized to divide the municipality into districts and to prohibit uses 'incompatible with the character of such districts.' (Ill. Rev. Stat. 1961, ch. 24, par. 11-13-1.) There is no intimation that the ready-mix business is not a lawful one, and as this Court observed in People ex rel. Trust Company of Chicago v. Village of Skokie, 408 Ill. 397, 'nowhere does the legislature grant to municipalities the power to wholly restrict a lawful business from their boundaries.' (See, also, People ex rel. Busching v. Ericson, 263 Ill. 368, 374). Moreover, there is nothing about a ready-mix concrete plant that is 'incompatible with' an industrial district so as to justify a municipality in prohibiting it therefrom."

The problem presented by your Department reveals that an ordinance licensing a property use to be known as a "Residential Care (Half-Way) Home" as a lawful business has not also made specific provision therefor by that particular term of art in the Chicago Zoning Ordinance, for which reason you are now holding 38 applications for said homes, rather than a situation in which the City of Chicago has prohibited same. Nevertheless, it is clear that under the definition of such a home, to which we have referred above, this property use clearly falls within the generic sense of a "convalescent home," or "rest home," or "nursing home," all of which are uses permitted within the R4 through R8 General Residence Districts. Being a lawful use, as shown by Chapter 136.2 of the Municipal Code of Chicago under which they will be licensed, and not being incompatible with the permitted uses enumerated above, which are permitted in the R4 through R8 General Residence Districts, it is our opinion that your Department may consider "Residential Care (Half-Way) Homes" as permitted within an R4 through

R8 General Residence District, whether falling within the concept of "convalescent home," or "rest home," or "nursing home."

With respect to the Business and Commercial Districts in which "Residential Care (Half-Way) Homes" may be located, we find that nursing homes, convalescent homes, and rest homes are not listed either as permitted or special uses within Business or Commercial Districts, and it is our opinion that "Residential Care (Half-Way) Homes" should be similarly treated.

Notwithstanding the foregoing opinion that "Residential Care (Half-Way) Homes" may be considered as permitted uses within the categories of convalescent, nursing or rest homes, we are recommending a zoning ordinance study by the Department of Development and Planning and the Zoning Ordinance Review Staff for consideration of whether such a property use should also be included within business and commercial districts as are hospitals and sanitariums as special uses, as well as for possible amendment so as to include this specific use by name for purposes of clarification.

RESIDENTIAL CARE HOME APPLICATIONS

(Zoning Administrator, Department of Buildings—A. H. October 14, 1969)

Your recent request for a delineation of an opinion rendered by this office on May 21, 1969, relative to the zoning requirements of "Residential Care (Half-Way) Homes" wherein we indicated that such establishments may be located in R4 through R8 General Residence Districts, but not in Business or Commercial Districts as permitted uses, has been referred to the undersigned for additional consideration.

You state that an application for a permit has been made to bring an existing legal non-conforming Residential Care (Half-Way) Home up to current health and welfare requirements of the State of Illinois and Board of Health of the City of Chicago which would not involve the expansion or addition to the physical premises but rather would be in the nature of updating plumbing installation of a sprinkler system, handrails and other devices required by the aforementioned governmental agencies. You state further that the premises in question are contained within an R3 General Residence District, being immediately adjacent on both sides to R4 General Residence Districts, the latter being exceptionally predominant in the area.

Non-conforming buildings and structures and the use thereof are subject to the provisions of Section 6.4-1 of the Chicago Zoning Ordinance, which reads as follows:

> "Repairs and Alterations. Ordinary repairs and alterations may be made to a non-conforming building or structure, provided that no structural alterations shall be made in or to a building or structure, all or substantially all of which is designed or intended for a use not permitted in the district in which it is located, except those required by law or except to make the building or structure and use thereof conform to the regulations of the district in which it is located. For the purpose of this section, repairs shall include the replacement of storage tanks where the safety of operation of the installation requires such replacement, and other replacements of/or substitutions for machinery or equipment not involving structural alterations to the building or structure except as hereinabove provided."

From the foregoing provision, we conclude that the repairs and alterations to which you make reference, depending upon whether they structurally alter the building, may otherwise be made to a non-conforming use such as you describe, particularly those repairs required by law and in the nature of protection of the public health, safety and welfare.

OFF STREET PARKING REQUIREMENTS

(Alderman, Fifth Ward—A. H.—August 18, 1967)

Your recent letter addressed to Honorable Raymond F. Simon, Corporation Counsel, requesting an interpretation of Section 7.12(9) of the Chicago Zoning Ordinance, has been referred to the undersigned for consideration and response. You state that a critical off-street parking problem exists in Hyde Park and that you are trying to increase off-street parking capacities by requiring one-for-one ratio of off-street parking facilities per apartment unit in General Residence Districts. You state further that Section 7.12(9) appears to prohibit an increase in off-street parking facilities by more than 50% of the legal requirement, thereby limiting a developer, whose property is located in an R7 General Residence District, to providing a ratio of no more than 90% off-street parking spaces to apartment units in view of the applicable ordinance provisions. It is your belief that the City Council could not have intended to prohibit a one-for-one off-street parking space ratio in R7 General Residence Districts.

The apparent legislative intent of the City Council in having adopted Section 7.12(9) (some four months after the Comprehensive Amendment was adopted) appears *inter alia* to have been to preclude a practice of permitting the establishment of an excessive number of off-street parking spaces which could be used for rental purposes beyond the legitimate off-street parking requirements of that building, thereby establishing *de facto* commercial parking garages, which are ordinarily permitted only in business and other intensive use districts.

Section 7.12(9), as written, does indeed prohibit the one-for-one off-street parking ratio to which you refer; however, it is our understanding that this problem has been submitted to the Chicago Zoning Ordinance Review Committee for consideration and recommendations with respect to making an appropriate amendment to the ordinance.

REAR YARD HEIGHT REGULATION

(Commissioner of Buildings—A. H.—October 27, 1967)

Your recent letter requesting an opinion with regard to property at 1515 N. Astor Street, addressed to the Corporation Counsel, has been referred to the undersigned for consideration and response.

The facts disclosed by your letter reveal that certain plans were submitted to your Department with an application for a permit to erect a 25-story apartment building, including as part of the structure a parking garage 27½ feet in height on the rear 30 feet of the lot at said address, which application was denied because the proposed parking structure constituted an obstruction in the required rear yard under Section 7.9-7 of the Chicago Zoning Ordinance.

The facts further reveal that an appeal from the Zoning Administrator's refusal to approve the application was then filed with the Zoning Board of Appeals, on the premise that parking structures are not obstructions in a required rear yard under Section 5.7-5 of the Chicago Zoning Ordinance. Thereafter, the Zoning Board of Appeals requested an opinion of the Law Department and received same under date of August 23, 1966, a copy of which was received by the Zoning Administrator two days later. A permit was subsequently issued on August 30, 1966, approving the original proposal in reliance on the opinion of the Law Department.

Subsequent to the issuance of the permit, the Zoning Board of Appeals considered the appeal still pending before it and on October 4, 1966, denied the appeal; however, denial failed to come to the attention of those handling permits because of normal office procedures and therefore no action was taken to revoke said permit at that time, according to your letter.

You state that the building is now at approximately its 6th floor elevation with approximately one-third of the garage structure already erected to the proposed 27½-foot level and that, upon being apprised of these facts, the Building Department revoked said permit due to the Zoning Board of Appeals' upholding the Zoning Administrator's original denial of the application, said revocation having been made on October 16, 1967.

The opinion you now request is whether the permit thus revoked should be reinstated, or not.

The request for opinion originated by the Zoning Board of Appeals, answered by our letter of August 23, 1966, asked whether the Zoning Board of Appeals had jurisdiction to hear this case in the form of an appeal from the decision of the Zoning Administrator or whether an application for a variation would have been the proper procedure before the Board. We concluded that the Board of Appeals had jurisdiction to consider the matter as an appeal, noting various provisions of the Zoning Ordinance, including that which authorized the Zoning Board of Appeals to grant a variation to permit any yard less than the yard required by the applicable regulation (Sec. 11.7-4(1)); and stating further than an appeal may be taken to the Board of Appeals from a decision of the Zoning Administrator (Sec. 11.8-1); that the Board had the power to affirm, reverse or modify any such decision (Sec. 11.8-2); that the subject property, being located in an R7 General Residence District, was subject to Sections 7.9-6 and 7.9-7 relating to regulations governing rear yards, as well as Section 7.9 which required that rear yards shall be unobstructed from the ground except as allowed in Section 5.7-5; and that Section 5.7-5 permitted the construction of enclosed, attached or detached off-street parking spaces, which were not to be considered obstructions when located in the required yards. Our opinion of August 23, 1966, also noted that the Office of the Zoning Administrator has issued a number of permits for off-street parking spaces in a required rear yard in excess of the 18-foot height reference appearing in Section 7.9-6 of the Zoning Ordinance, in his apparent interpretation of the aforesaid provisions of the Zoning Ordinance.

In supplementation to the August 23, 1966 opinion of this office, as it affects your request for an opinion, we make a still closer analysis of Section 7.9-6 of the Zoning Ordinance which, by reference, regulates rear yards in an R7 General Residence District. The language therein reveals that "a rear yard . . . not less in depth than 30 feet," must be provided along every rear lot line "but may begin at a height of 18 feet above curb level." It is evident from the foregoing language that a rear yard is a requirement in an R7 District even though it "may begin at a height of 18 feet above curb level." The words "may begin" could be construed to provide that said yard may indeed be higher than 18 feet. As noted in our opinion of August 23, 1966, the Zoning Administrator had apparently theretofore so construed said language so as to have issued a number of permits for off-street parking at a level in excess of 18 feet in height, presumably with the rear yard commencing above said structure. (The above-noted language could more clearly have limited the height of an attached garage and the commencement of the rear yard above it by providing, as in Section 5.6-3 relating to detached garages, that no such building ". . . shall exceed 18 feet in height," had that been the legislative intent.) It has been held by the courts that long continued interpretation of a law by executive officers must be accorded great weight unless a contrary interpretation is clearly required by the words of said law. See, *e.g., O'Brien* v. *City of Chicago,* 347 Ill. App. 45, and authorities therein collected.

Furthermore, Section 5.7-5(3) of the Zoning Ordinance specifically exempts, as an obstruction in a rear yard, enclosed, attached or detached off-street parking spaces, among other things. Although Section 5.6-2 limits the permissible area to be occupied by an accessory building or buildings to no more than 50 per cent of the area of a required rear yard, the Zoning Administrator apparently has considered this section satisfied where the permittee provides for the establishment of a rear yard at uppermost height levels of the garages he has permitted to be constructed under the circumstances of each case. It may well be that the City Council did not intend for any required rear yard to be established at a

point higher than 18 feet above curb level; however, in view of the apparently consistent interpretation by the agency charged with responsibility of enforcing the ordinance, the language to which we have referred should be amended so as to clarify such legislative intent.

Turning now to the question posed by the unusual circumstances presented by the instant case, it appears that the permit, once having been denied by the Building Department, was subsequently approved prior to the affirmation of the denial by the Zoning Board of Appeals on appeal from said initial denial. The facts presented do not disclose whether the permittee substantially changed position after issuance of the permit between the time the permit issued and the time that the Zoning Board of Appeals rendered its opinion with regard to affirming the initial denial. It would seem that both the Zoning Administrator and the permittee would have and should have known that unless and until the appeal was withdrawn from consideration by the Zoning Board of Appeals, or that the Board was notified of the subsequent action, said Board would have no knowledge of the issuance of the permit. Had the appeal been withdrawn or had the Zoning Board of Appeals been so informed by either of said parties, and the permit issued, interested neighborhood property owners would have had the opportunity, should they have been desirous of so doing, to question the issuance of the permit when it became apparent that construction was proceeding under a permit with which they were in disagreement. In having just filed such a lawsuit in the Circuit Court of Cook County (67-Ch-4312), however, they appear now to be in substantially that position.

Meanwhile, in what appears to be a mutual misunderstanding, if not a comedy of errors, the permittee has gone forward with his permit and apparently has constructed approximately one-third of the total intended construction, including the permitted principal building, in pursuance of a permit which from August 30, 1966 until October 16, 1967, had not been revoked. We have been informed that the permittee's financial liability involves a multi-million dollar commitment to this project. A court may very well hold under the foregoing circumstances that said permittee cannot be prevented from completing construction with respect to the principal building otherwise permitted in the zoning district in which it is located.

As to that portion of the accessory structure which occupies what would have been the rear yard and is now intended to provide automobile parking spaces, presumably providing further for the rear yard atop said structure as required by ordinance, it would be possible for a court to hold that the permit having been granted in August of 1966 and revoked some fourteen months later, operates as an estoppel in pais against its revocation. In *Cities Service Oil Co.* v. *City of Des Plaines,* 21 Ill.2d 157, the Illinois Supreme Court comprehensively reviewed principles and authorities involved in an analogous situation, wherein a permit was issued for the construction of a gasoline service station in a district in which said use was permitted, but at a location which was too close to a church under other ordinances, held, among other things (21 Ill.2d at 163):

> "In the case at bar, however, the lapse of seven months without any attempt to revoke the permit constitutes conduct on the part of city authorities from which it could reasonably be inferred that its issuance was, in effect, ratified. (See *City of El Paso* v. *Hoagland,* 224 Ill. 263.) We conclude that the facts and circumstances of this case are sufficient to raise an equitable estoppel against the city."

See, also, *People ex rel. Beverly Bank* v. *Hill,* 75 Ill. App.2d 69; *Phillips Petroleum Co.* v. *City of Park Ridge,* 16 Ill. App.2d 555; and *Deer Park Civic Ass'n* v. *City of Chicago,* 347 Ill. App. 346.

From the foregoing facts, ordinance provisions, and case authorities, the position of City of Chicago in revoking the permit for constructing the balance of the apartment building, which is permitted in the zoning district in which it is located, is very questionable to say the least, and the City may indeed be estopped from questioning the height of the garage building for which it issued a permit 14 months ago which is now sought to be revoked. Should the City refuse to reinstate said permit, it may well be compelled to do so in a mandamus action.

Should the Circuit Court in the case docketed as No. 67-Ch-4312 determine that the 27-foot 6-inch height of the accessory garage is in excess of that permitted by ordinance, the permittee will no doubt be required to remove that portion of the structure which offends the ordinance in any event. Therefore, it is our opinion that the permit should be reinstated.

CHANGE IN USE IN BUSINESS PLANNED DEVELOPMENT

(Commissioner, Department of Development and Planning—A. H.—August 14, 1969)

Your request for an opinion with respect to a "change in use" within an area previously designated as a "Business Planned Development" at the above noted location has been referred to the undersigned for consideration and response.

You have enclosed documents and correspondence which reveal that the property in question is located roughly between Higgins Road on the north, the Kennedy Expressway on the south, a point west of the Pueblo Avenue Cloverleaf on the east and a point east of East River Road on the west. Said area has been designated "Business Planned Development No. 44" by the City Council in an ordinance passed January 20, 1967 (J. Couns. Proc. 1-20-67, pp. 8405-10). The previous zoning of said property was B5-1 General Service District. The property was delineated into two sub-areas: Sub-Area A having been owned by Marriott Motor Hotels, Inc., and Sub-Area B having been owned by Seay & Thomas, Inc. Sub-Area A, the larger area, encloses Sub-Area B on the east, the south and the west; and Higgins Road is the northern boundary of Sub-Area B. It should also be noted that the property directly east and west of this Planned Development is presently zoned B5-1 General Service District. To the north of the Planned Development, across Higgins Road, are the city limits and to the south of the Planned Development, across the Kennedy Expressway, the property is substantially zoned for business and commercial uses, with the exception of a narrow corridor zoned for residential uses.

The Planned Development ordinance designates the use of Sub-Area A for hotel and auxiliary purposes and Sub-Area B for office and auxiliary purposes, both of which are permitted within a B5-1 General Service District. It appears from the documentation and correspondence that Marriott Motor Hotels, Inc., has now purchased Sub-Area B and seeks to use said area, in conjunction with new hotel construction in Sub-Area A, for off-street parking purposes only. You ask "whether said change in land use is of sufficient degree to constitute a major change in land use thereby requiring of [sic.] the Marriott Corporation to submit an amendment to the Planned Development to the City Council."

Turning first to the Chicago Zoning Ordinance (Municipal Code of Chicago, Chap. 194A), we note in Section 3.2 the following language relating to Planned Developments:

> "For the purpose of utilizing effectively the benefits inherent in large scale development of land including a more efficient and more economical development pattern, and a more attractive and varied arrangement of structure types and open spaces than is possible under standard regulations for single lots, a tract of land may be developed as a 'Planned Development' *subject to the applicable zoning classification and the basic intent and purpose of this Zoning Ordinance.*" (Emphasis supplied.)

Section 11.4-1(1)c. of the Zoning Ordinance requires certain findings by the Commissioner of Development and Planning, before the passage of a Planned Development ordinance, among others:

> "2. That the uses to be permitted shall be for the purpose of developing an integrated site plan in *conformity with adjoining areas;*

3. That the intensity of use to be permitted by such amendment is necessary or desirable and *is appropriate with respect to the primary purpose of the development and with that of surrounding land use and zoning;*" (Emphasis supplied.)

Paragraph 3 of the Statement contained within the Plan of Development as part of the Planned Development Ordinance (J. Couns. Proc. p. 8405) sets forth the following:

"Off-street parking and loading facilities shall be provided in compliance with this Plan of Development as authorized by the B5 General Service District classification of the Chicago Zoning Ordinance."

To the same effect is the language contained within the Planned Development Use and Bulk Regulations set forth in Business Planned Development Ordinance No. 44 (J. Couns. Proc. 1-20-67, p. 8410).

Paragraph 7 of the Statement contained within the Plan of Development as part of the Planned Development Ordinance (J. Couns. Proc. p. 8406) sets forth the following:

"The following information sets forth data concerning the property included in said Planned Development and data concerning a generalized land use plan (site plan) illustrating the development of said property in accordance with *the intent and purpose of the Chicago Zoning Ordinance as related to a B5 General Service District classification and with the regulations hereby made applicable thereto.*" (Emphasis supplied.)

From the foregoing provisions, it is apparent that the City Council intends that Planned Development uses must be integrated with respect to surrounding land uses and zoning. Business Planned Development No. 44, therefore, must be considered within the context of surrounding property uses and zoning, which is principally B5-1 General Service District. Also to be considered is the effect of Sub-Area A and its development for hotel purposes upon Sub-Area B which has not as yet been developed.

An examination of the off-street parking and loading provisions applicable to a B5-1 General Service District, as set forth in Section 8.11-1 of the Zoning Ordinance, reveals the following provision therein contained, among others:

"Off-site parking spaces accessory to a use in a B District may be located in any B, C or M District, but may not be located in any R District, except as allowed in Section 7.4-1(4)."

Similar provisions also appear in many other Business, Commercial and Manufacturing Districts, it being the apparent legislative policy to permit the use of property zoned for business, commercial or manufacturing uses to be used for off-site parking spaces accessory to other uses within Business Districts.

From the foregoing we conclude that since Business Planned Development No. 44 permits uses otherwise permitted within its previous B5-1 General Service District classification and makes off-street parking and loading requirements subject to the existing B5-1 District requirements, and since other property nearby, including Sub-Area A, is substantially zoned for business purposes, then with respect to the proposed use of Sub-Area B for off-street, off-site parking accessory to the uses permitted in Sub-Area A, the request of Marriott Motor Hotels, Inc., to use Sub-Area B for said parking purposes may be permitted administratively without additional City Council consideration, as the same would be permitted under Section 8.11-1 of the Zoning Ordinance without further Council action.

PLANNED DEVELOPMENT— SINGLE CONTROL REQUIREMENT

(Commissioner, Department of Development and Planning—A. H.— April 10, 1969)

Your communications regarding a proposed amendment (proposed Manufacturing Planned Development No. 8) to the Planned Development located north of the Lake Calumet Entrance Channel, west of S. Stony Island, and east of the Lake Calumet Anchorage Basin, have been referred to the undersigned for consideration and response. You ask that an opinion be rendered regarding sufficiency of control by the applicant, Bulk Terminals Company, a Delaware corporation, Lessee of the property, within the purview of the Planned Development ordinance, and you have forwarded seven documents (herewith returned to you) reflecting various leases, agreements, subleases and assignments between various parties.

We start with the language of the ordinance governing Planned Developments, Section 3.2 "Planned Development," which is defined, in part, as follows,

> "A 'Planned Development' is a tract of land which is developed as a unit *under single ownership or control, or which is under single designated control by a common ownership* at the time it is certified as a 'Planned Deveolpment' and which includes two or more principal buildings, . . ." (Emphasis supplied.)

and consider the ownership or control status of the subject property with the foregoing language as a frame of reference.

The area in question is apparently owned by the Chicago Regional Port District, a body politic and municipal corporation, but was leased to the Bulk Terminals Company on July 1, 1960, for a term of sixty-six years, according to the conformed copy of lease forwarded with your letter.

A leasehold estate, the unexpired term of which exceeds five years, as in the instant circumstances, can be considered an interest in real estate for certain purposes (see, *e.g.*, Ill. Rev. Stat. 1967, Ch. 77, Par. 3). This may be considered herein so as to give the Lessee, Bulk Terminals Company, a sufficient interest in the leased premises under its 66-year term to qualify under the "single ownership or control" provision of the Planned Development ordinance.

Upon review of the other documents forwarded to this office, however, the requisite "single ownership or control" or "single designated control by common ownership" appears to be absent. These documents include an agreement dated October 22, 1965, between Midwest Docks, Inc. (which purchased the assets of the Bulk Terminals Company on June 3, 1965, including its interest in and under the 66-year lease hereinabove referred to) and the International-Great Lakes Shipping Co., the latter party purporting thereunder to purchase an assignment of Midwest's leasehold interest in a portion of the premises covered by the Port District lease, with various additions made thereafter. Also included is an additional lease between Bulk Terminals Company and Refiners Transport and Terminal Corp. on July 1, 1965, in which it conveyed another portion of its leasehold interest in another part of the demised premises.

It thus appears that the subject property is owned by one party, leased to another, which, in turn, assigned part and subleased part to still two other parties, none of whom have joined in the application with the Lessee. Therefore, the application for a Planned Development by Bulk Terminals Company alone and without more cannot be considered as legally sufficient in view of the interests in the same Planned Development area under consideration by International-Great Lakes Shipping Co. and Refiners Transport and Terminal Corp. without each of the last mentioned entities joining in the application or making a legally

sufficient designation of Bulk Terminals Company as their agent having "single designated control by a common ownership" required by ordinance.

In addition, we are compelled to note certain provisions in the lease between Bulk Terminals Company and Chicago Regional Port District, which also raise questions respecting the propriety of the application by Bulk Terminals Company alone for the proposed Manufacturing Planned Development. Under Article 1, Paragraph 1.2 of said lease, the Lessee is given the right to use and occupy premises ". . . for the purpose of constructing, operating and maintaining public port and terminal facilities for general bulk terminal operations and for the receipt, storage, delivery and distribution of dry bulk and liquid bulk commodities by ship, barge, rail, truck, pipe line and/or other transportation media, as well as the blending, packaging and reconditioning of said commodities, as may be desired by lessee; . . ." Article 2, Paragraph 2.7, repeats the above and foregoing purposes in the use of the premises. Article 4, Paragraph 4.1, reiterates the provisions contained in Paragraph 1.2 and 2.7. Article 12, Paragraph 12.1, provides that the Lessee shall not assign, transfer, set over, sublease or convey any part of the demised premises or improvements thereon ". . . without the written consent of the Lessor first had and obtained thereto, by resolution duly adopted at a regular Board meeting of Lessor." The proposed sublease between Bulk Terminals Company and Welded Tube Company reveals the intent to construct a steel tube manufacturing facility within the area of the Planned Development, contrary to the above and foregoing provisions and purposes. No written consent has been included among the documents forwarded to us. Therefore, the omission of the Chicago Regional Port District as a co-applicant for the proposed Manufacturing Planned Development becomes somewhat acute.

We suggest that one of the two following alternatives could remove the present objections:

1. That Bulk Terminals Company be joined as co-applicants in an amended application by the Chicago Regional Port District, International-Great Lakes Shipping Co. and Refiners Transport and Terminal Corp.; or

2. That Bulk Terminals Company submit, in support of its present application, a copy of the written consent of the Chicago Regional Port District to the proposed sublease with Welded Tube Company, as well as a designation in proper legal form by International-Great Lakes Shipping Co. and Refiners Transport and Terminal Corp. of Bulk Terminals Company as their designated agent for the purpose of securing the proposed Manufacturing Planned Development. If the proposed sublease between Bulk Terminals Company and Welded Tube Company has already been executed, the Welded Tube Company should also either join as co-applicant for the proposed zoning change as described in Paragraph 1 above, or submit a document designating Bulk Terminals Company as its agent for the purpose of the zoning change, as described in this Paragraph.

We express no opinion with respect to the advisability of permitting a manufacturing use within an area presently considered eligible for hazardous use storage under Chapter 60, Section 60-52, "Capacity Limits," of the Municipal Code of Chicago.

SALE OF PLANNED DEVELOPMENT LAND TO PARK DISTRICT

(Commissioner, Department of Development and Planning—H. F. W. —June 21, 1972)

We wish to acknowledge receipt of your letter addressed to Mr. Richard L. Curry, Corporation Counsel of the City of Chicago, in which you advise our office that the Chicago Planning Commission is presently considering acquiring a

part of the vacant land in Residential Planned Development No. 11 as an addittion to Lerner Park. In your letter you request an opinion as to whether the vacant land within said development which has been designated as open space may be acquired by the Chicago Park District and used for park purposes.

Under the Chicago Zoning Ordinance, Chapter 194A of the Municipal Code of Chicago, the designation of a tract of land as a Residential Planned Development is a change in zoning. Said designation does not prohibit, restrict or limit the right of the owner or owners to sell or transfer all or part of the land in said planned development. However, the subsequent owner or owners of all or a portion of planned development are bound by the terms and conditions of said residential planned development as it pertains to the parcel acquired.

While your letter does not state the status of construction under the planned development, we are assuming that all of the construction authorized under the original Residential Planned Development No. 11 has been completed and that the vacant land purposed to be acquired for a park is now presently part of the open space required under said planned development. Open space within a residential planned development may be used for park purposes. Acquisition of the open space by the Chicago Park District for an addition to Lerner Park would not change the zoning of the parcel i.e., affect the designation of that land as part of the planned development. However, the open space so acquired for park purposes would not be available for construction thereon.

Open space in a residential planned development or any other portion of a said development may be sold by the recipient of the development designation to the Chicago Park District or any other purchase without the necessity of said land being deleted from the planned development. The purchaser acquires the property subject to the terms and conditions of the Residential Planned Development, which, in this case would be to use the land as open space. Acquisition of this land by the Chicago Park District for a park would be for a land usage which falls within the definition of open space.

It is the opinion of our office that it is not necessary for the Department of Development and Planning to Process an Amendment to Residential Planned Development No. 11, and withdraw the proposed park site from said planned development as a condition precedent to the Chicago Park District entering into a contract for the purchase of said property.

SALE FOR REDEVELOPMENT

(Deputy Commissioner, Department of Urban Renewal—E. L. N.—May 7, 1971)

At your request, our office has reviewed the bid submitted by PIPER'S ALLEY CORPORATION for the acquisition of the above referenced parcels.

On October 23, 1970, the Department of Urban Renewal offered and advertised for purchase several properties located on the North side of West North Avenue between North Park Avenue and North LaSalle Street.

Only one bid was received on January 21, 1971 for the purchase of the said property. The sole bidder was PIPER'S ALLEY CORPORATION. The amount bid for the said parcels was $362,000.00, which was based on an overall price of $11.31 per square foot. This total bid price is in exces of the minimum prices established by the Department of Urban Renewal for the four parcels, that price being $345,239.60. An allocation based upon the square foot average price bid by the Developer would result in the following:

PARCEL	SIZE	AMOUNT
1-B	20,004 Square Feet	$226,218.84
2A-B	5,060.4 Square Feet	57,255.35
2B-B	1,431.7 Square Feet	16,214.75
3-RC	9,265.0 Square Feet	62,311.06
TOTAL		$362,000.00

The developer, Piper's Alley Corporation, proposes that the parcels be developed in the following manner:

1-B

Business use on the first floor with residential on the upper floors.

2A-B, 2B-B, and 3-RC.

Are to be developed in conjunction with the developer's presently owned property which surrounds the subject parcels.

In general, the uses for the said property can be described as a combination Commercial, Residential and Parking.

The question arises as to *whether the proposed use for parcel 1-B, namely, a combination of business and residential* use conforms to the "Urban Renewal Plan" and the "Instructions to Developers."

The pertinent provisions of the "Instructions to Developers", which incorporates the Urban Renewal Plan Controls are as follows:

"Parcel 1-B is zoned B4-5 Restricted Service District; Parcels 2A-B and 2B-B are zoned B4-4 Restricted Service Districts. Parcel 3-RC is zoned B2-4, Restricted Retail District.

Prospective redevelopers are advised that proposals must comply with the Chicago Zoning Ordinance and Building Codes.

With respect to the development of Disposition Parcel 3-RC business uses shall be on the first floor only and shall be of a convenience nature, such as retail sales and services, professional services, studio, etc. Residential density on the upper floors shall not exceed a maximum of 80 dwelling units per acre. Parking and loading facilities shall be adequate to satisfy all requirements for both residential and business development."

It is the opinion of this office that the development of parcel 1-B is limited by the zoning only, namely "B4-5, Restricted Service District", and further, that the restriction with respect to parcel 3-RC does not apply to parcel 1-B since the language of the Urban Renewal Plan Controls specifically limits the restricted use to parcel 3-RC. An analysis of the bid should be in accordance with the zoning limitations as set forth in the zoning ordinance with respect to property zoned B4-5.

A review of the Re-use appraisal indicates that the value of parcel 1-B was predicated upon the re-use being limited to a "one story commercial" structure. Therefore, the concurred in price by the Department of Urban Renewal was $13.50 per quare foot. Since it is the opinion of this office that the permitted use of parcel 1-B is any use permitted in accordance with "B4-5" zoning, the subject parcel should be re-appraised to determine whether the value as stated by the Appraisers properly reflects the opinion of this office regarding the use to which the properties can be developed.

A determination by your office and the Board of the Department of Urban Renewal as to whether the bid of Piper's Alley, Inc., being the only bidder, should be accepted must reflect the following considerations:

1. The permitted use of Parcel 1-B is any use authorized under the zoning classification B4-5.

2. The re-use value as determined by the appraisers based on the highest and best use as indicated in the foregoing paragraph.

If there is anything further that your office requires in this regard, kindly contact Mr. Earl L. Neal.

PERMIT FOR SANITARY LAND FILL

(Commissioner, Department of Streets and Sanitation—A. H.—May 28, 1968)

Your correspondence addressed to Raymond F. Simon, Corporation Counsel, requesting an opinion with respect to an application filed by the Cal-Harbor Development and Disposal Company for a permit to operate a sanitary landfill in the area bounded by 119th Street, S. Paxton Avenue, 120th Street and S. Luella Avenue, has been referred to the undersigned for consideration and response.

You state that the Zoning Board of Appeals approved a special use for the operation of said landfill, after ordered to do so by the Court following an unsuccessful appeal to the Illinois Appellate Court and you ask whether, under said circumstances, an owner who meets all requirements for said sanitary landfill as provided by ordinance must be isued such a permit and, if so, whether said permit may nevertheless be issued if written objection is received from the Alderman of the Ward in which the landfill is located.

In a subsequent letter you enclose a copy of a letter written by Alderman John J. Buchanan, representing the 10th Ward, in which said sanitary landfill would be situated, objecting to the establishment in his Ward of another "garbage dump."

A brief examination of the history of this case will assist in the determination of the issues herein presented. The premises under consideration are located within an M3 Heavy Manufacturing District under the Chicago Zoning Ordinance. Sections 10.4-2(4) and 10.4-3(1) reveal that dumping or disposal of garbage, refuse, or trash is permitted as a special use in such a zoning district. On October 29, 1963, the Zoning Board of Appeals denied a special use application for said property and an administrative review action in the Circuit Court ensued. The Court remanded the case to the Zoning Board of Appeals to take further testimony and obtain recommendations of the Department of Streets and Sanitation and "Planning Commission" of the City of Chicago. Following a further hearing, on February 3, 1965, the Zoning Board of Appeals again denied the special use application. The then Department of Planning recommended that the special use be granted provided all ordinances of the City and regulations adopted by the Department of Streets and Sanitation were fulfilled by the applicant. On June 3, 1965, the Circuit Court reversed the determinations of the Zoning Board of Appeals and directed that approval be granted for the establishment of a sanitary landfill operation on the subject property, among other properties. An appeal was prosecuted to the Appelate Court, which was dismissed on December 11, 1967, thereby permitting to stand the order of the Circuit Court entered June 3, 1965, directing the approval of the special use aforesaid. On March 22, 1968, the Zoning Board of Appeals complied with the order of June 3, 1965, and allowed the special use.

It appears that the application for a private landfill permit was filed with your Department on March 26, 1968. Apparently following the provisions of Chapter 99, Section 99-36.2, your Department notified Alderman John J. Buchanan of the application and on April 15 the Alderman wrote you objecting to the establishment of a sanitary landfill at the sites in question, basing his objec-

tions upon the theories that each area of the City should provide a garbage dump for its own needs; that the enforcement of the ordinance is uneven with respect to different owners; that other scavangers and landowners will attempt to enter the area; and that he does not wish the 10th Ward and the Lake Calumet area to continue to be the garbage dump of the Midwest or the garbage capitol of the world.

Section 99-36.2 to which we have alluded above provides as follows:

> "Upon receipt of such application [to operate a sanitary landfill on private property], the Commissioner of Streets and Sanitation shall give notice in writing to the Alderman of the Ward in which such dumping is to be done, that such application has been made. Such application shall be held in abeyance until an intervening council meeting is held or written waiver of objection or written consent by the Alderman is received."

An investigation reveals that four regular Council Meetings have taken place since the writing of the aforesaid letter of April 15, 1968, to-wit: April 17; May 8; May 20; and May 28. We are unable to find any legislative action initiated under which the zoning of said property would be affected or the establishment of a sanitary landfill precluded. The apparent intent of the notice provision is to make certain that the Alderman of the Ward in which such an operation is proposed to be established has the opportunity to initiate such appropriate legislative action as he would deem necessary. Such opportunity appears to have been afforded the Alderman in the instant matter.

Under the foregoing circumstances where the special use application once denied has been approved upon Court order, with an appeal dismissed, and where no legislative action has been initiated or undertaken in the interim period, and where the application is otherwise in good order, your Department may issue a permit for a sanitary landfill.

SPECIAL USE FOR CHICAGO PUBLIC LIBRARY

(Commissioner, Department of Public Works—Commissioner of Buildings—Commissioner, Department of Development and Planning—A. H.—August 14, 1967)

Your recent letter addressed to Honorable Raymond F. Simon, Corporation Counsel, requesting advice as to the propriety of establishing a Branch of the Chicago Public Library as a special use at the above-described address, has been referred to the undersigned for consideration and response. According to the information contained in your letter, the property involved is a through lot which fronts on Northwest Highway and on N. Newark Avenue, and is located in a B2-1 Restricted Retail District. You advise that the Board of Directors of the Chicago Public Library has determined the need for the use of this site as a library; has purchased the subject property; and is otherwise in the process of causing the construction of a Branch on said property.

An examination of Article 8, Sections 8.4-1 and 8.4-2 of the Chicago Zoning Ordinance (Municipal Code of Chicago, Ch. 194A, Secs. 8.4-1(11)f and 8.4-2(1)) reveals that public libraries may be established as special uses on property contained within a Restricted Retail District. Article 11 sets forth the procedures to be followed in establishing special uses, including application, hearing and determination by the Zoning Board of Appeals; however, on November 19, 1957, in Opinion No. 12181 (24 Op. Corp. Counsel, 487) Judge John C. Melaniphy then Corporation Counsel, advised the Chicago Public library that the selection of a site and the preparation and approvals of plans by the Board of Directors of the Chicago Public Library and the City Architect constituted the performance of a judicial act requiring judgment or discretion of a municipal agency to which the hearing law would have no application and that the building permit for construction of said library should issue. Accordingly, in ..... of the foregoing

opinion, it appears unnecessary for the Chicago Public Library to follow the procedural steps outlined in the Zoning Ordinance for securing special uses.

Prudence appears to dictate, nevertheless, that the proposed plans be submitted to the Department of Development and Planning so as to insure harmony between the proposed use and such zoning and planning considerations as may be applicable thereto.

We are taking the liberty of forwarding copies of this letter to the Commissioner of Buildings and the Commissioner of Development and Planning.

ENFORCEMENT OF CONDITIONS ON SPECIAL USE

(Chairman, Zoning Board of Appeals—A. H.—August 10, 1967)

Your recent letters of August 4 and June 22, 1967, addressed to Raymond F. Simon, Corporation Counsel, concerning the enforcement of conditions imposed by the Zoning Board of Appeals upon granting variations in the nature of special uses, have been referred to the undersigned for consideration and response. You ask whether it would be possible for the Board to write into their orders restrictive provisions that would permit the orders to be cancelled unless the conditions are complied with within some reasonable period of time and continuously thereafter.

The authority for imposing conditions or restrictions upon the construction, location and operation of a special use, including off-street parking, as are deemed necessary to secure the general objectives of the Zoning Ordinance is to be found in Article 11, Section 11.10-5 of the Zoning Ordinance (Municipal Code of Chicago, Ch. 194A, Sec. 11.10-5). No authority is found, however, which delegates to the Zoning Board of Appeals the power to cancel its orders unless said conditions are fulfilled. This by no means suggests, however, that the conditions and restrictions need not be fulfilled or cannot be enforced in appropriate proceedings.

The proceedings to which we allude are contemplated in Section 11.2-2, Article 11, of the Zoning Ordinance, wherein the Bureau of Zoning of the Building Department, through the Zoning Administrator, is directed to enforce the provisions of the Zoning Ordinance and, in subparagraph (3) of Section 11.2-2, is directed particularly to "conduct inspections of buildings, structures, *and uses of land to determine compliance with the terms of this comprehensive amendment. . . .*" (Emphasis supplied.)

In the event a violation of the Board's conditions or restrictions is reported or otherwise found, notification thereof should be given to the Bureau of Zoning of the Building Department, Office of the Zoning Administrator. Upon finding such a violation, the Office of the Zoning Administrator should cause charges and specifications to be drawn and forwarded to the Corporation Counsel for enforcement action. In this way, the factual circumstances in which the alleged violations are taking place can be investigated, documented and proven in a court of law with appropriate remedies imposed by the court as required.

We are taking the liberty of forwarding a copy of this opinion to the Bureau of Zoning of the Building Department, Office of the Zoning Administrator, and to Commissioner Sidney D. Smith.

EXPANSION OF A SPECIAL USE

(Zoning Administrator, Department of Buildings—H. F. W.—July 7, 1971)

We wish to acknowledge receipt of your letter of May 20, 1971 addressed to Mr. Richard L. Curry, Corporation Counsel of the City of Chicago, in which you request an opinion as to whether the installation of hydraulic lifts on a ground

level parking lot would constitute an expansion of a special use. You attached a copy of a letter dated May 18, 1971 from Duo Park Corporation of Illinois to to your communication.

Section 11.10-5 of the Chicago Zoning Ordinance, which deals with variations in the nature of special uses reads, in part, as follows:

> "A change or increase in the area, bulk or function of any existing or special use, or from the conditions specified by the Zoning Board of Appeals at the time of approval, shall constitute and be considered the same as a new and distinct special use, and as such, shall be subject to the procedures for application, hearing review and approval by the Zoning Board of Appeals as provided for in this Section."

In reviewing various resolutions of the Zoning Board of Appeals in which said Board granted a variation in the nature of a special use for off street parking limited to ground level parking, we note that the resolutions do not specify a limitation as to the number of cars that may be parked on said ground level parking facility. Even though an applicant requesting a special use does introduce evidence and testify as to the details of his proposed use which may include statistics as to how many cars he proposes to park on a specific parcel, the resolution of the Zoning Board of Appeals does not specify the number of cars that may be parked on the subject parcel nor the number of square feet required per car. It would therefore appear that a recipient of a special use for off street parking at ground level only would be permitted to park his customers cars as close to one another as he determined, and in this manner vary the capacity of the lot to a small degree. From a review of Mr. Scarpelli's letter of May 18, 1971, it appears that an operator of a ground level parking lot could, by the installation of hydraulic lifts, increase the capacity of the lot from approximately 25 to 50%. Mr. Scarpelli in his letter requests that the recipients of special uses be granted "an extension of said special uses".

It is the opinion of this writer that the placing of hydraulic lifts on ground level parking lots would constitute a change or increase in the area, bulk or function of an existing special use, and as such, the operator of a ground level parking lot who proposes to install hydraulic lifts on the property covered by a previously issued special use comes within the provisions of the Chicago Zoning Ordinance, Chapter 194A of the Municipal Code cited above. The application for the installation of hydraulic lifts should be treated as a request for a new and distinct special use subject to the procedures for application, hearing, review and approval by the Zoning Board of Appeals as to each ground level parking facility. Therefore, said applicant should be required to file an application for the approval of a new and distinct special use as an expansion of the special use previously granted to said applicant.

VARIATION GRANTING ADDITION TO EXISTING BUILDING

(City Council—M. E. A.—November 22, 1967)

On November 20, 1967, the Illinois Appellate Court rendered an opinion affirming a judgment of the Circuit Court of Cook County which had affirmed the decision of the Zoning Board of Appeals granting a variation to the defendant property owners.

The defendant property owners sought and received from the Zoning Board of Appeals a variation allowing them to construct a two-story brick three-apartment addition to the existing building located in the Old Town area. The Brief of the property owners, however, misconstrued the variation granted by the Board and contended that they were granted the right to construct a four-apartment addition which further was to be connected to the principal building by a canopy, resulting in a detached building in violation of the Zoning Ordinance.

The Illinois Appellate Court agreed with both the property owners and the City that the Circuit Court properly affirmed the decision of the Board. The Court further stated that (Opinion p. 6) ". . . the City . . . correctly points out that the

property owners in their brief seem to have misconstrued the decision of the Board of Appeals. The Board decided that a permit would be granted to erect a two-story brick three-apartment addition to the existing building. In their brief the property owners erroneously refer to four apartments and to the fact that the buildings '. . . would be connected by a canope.' The use of a canopy would result in a detached building . . . We construe the decision of the Board to be that the authorized addition must be joined to the present structure by a party wall or walls."

ORDER OF VARIANCE FOR TALL SIGN AT O'HARE

(Director, State of Illinois Department of Aeronautics—R. L. H.—May 24, 1972)

We are in receipt of your Order of Variance dated May 12, 1972, in the above entitled matter and are at a loss to understand its issuance in view of the past history, the objections raised for approximately a year-and-a-half by your Department and the City of Chicago and a misstatement of a very material fact in said Order.

In early 1970 this applicant requested approval under FAA Case No. 70-CHI-462-OE for the construction of an 86 foot sign at the exact same location as the instant case. The City of Chicago's objections were made in response to the Notice of Proposed Construction and were repeated upon receipt of the FAA Notice of Aeronautical Study. Your Department also voiced a strong objection in a letter dated November 4, 1970, to the FAA, copy attached.

On February 1, 1972, in the instant case, this applicant requested approval of a 77 foot sign, which, although 9 feet shorter than the previous request, still exceeds the maximum height allowable under the O'Hare Zoning Regulations and the City's objections were again made.

The Order of Variance issued by you on May 12, 1972 sets forth in the first "Whereas" clause on page 2 that an 86 foot "Air Canada" sign is located approximately 100 feet West of the proposed instant location. We have had the area inspected and find that the foregoing is an absolute misstatement of actual facts. In the event such a sign was so located, it would fall 100 feet closer to the airport boundary and could be considered a shield to the instant sign being 9 feet higher. The "Air Canada" sign and a companion sign authorized by variance dated January 12, 1970, prior to the applicant's filing of FAA Cases No. 70-CHI-42-OE and 70-CHI-43-OE relating thereto are in fact located approximately 500 feet South and slightly *East* of the proposed instant location such that no shielding effect is present. Objections were also voiced to these two signs which are also violative of the O'Hare Zoning Regulations but the variance granted prior to FAA notification permitted construction.

It is the position of the City of Chicago that no hazards to air traffic will be allowed around the airport and it was assumed that safety was also an important consideration of your Department. The issuance of this variance in the face of your own Department statement that "the proposed structure would create a hazard to aircraft making instrument approaches to runway 27R" leaves a doubt in our minds.

We also deem it necessary to state that the proposed construction site is not located in Rosemont, Illinois, as stated in the variance but is located within the City limits of Chicago, the Soo Line right-of-way having been annexed to the City of Chicago in 1962.

Pursuant to the foregoing, we respectfully request your reconsideration of the Order of Variance and suggest that the O'Hare Zoning Regulations as promulgated by the State of Illinois Department of Aeronautics were meant to be followed as rigidly as possible and not waived every time a request is made for a variance.

VARIANCE FROM O'HARE ZONING

(Director, Department of Aeronautics State of Illinois—R. L. H.—February 2, 1971)

Your letter of recent date requests our current thinking in respect to variances from the applicability of the O'Hare Zoning Regulations requested from your Department in the above cited cases.

As regards Case No. 70-CHI-45-OE, your letter indicates a requested variance to permit a sign to be constructed to a height of 65 feet above ground level. It is our understanding that this case number was assigned by the FAA to a Notice of Proposed Construction of a sign 40 feet above ground level rather than 65 feet, and that the FAA circulated an Aeronautical Study Notice on this basis which indicated that the 40 feet would exceed the Federal Aviation Regulations by 6 feet as applied to proposed runway 22L at O'Hare.

The letter from our Department of Development and Planning, dated February 16, 1970, sent to both the FAA and your Department indicated quite clearly that the City of Chicago had no objections to the 40 foot height requested. Our only concern was that an illuminated sign, even at this height, might be a hazard to air navigation in view of the language contained in Section 10.5 of the O'Hare Zoning Regulations.

It was our position at that time, and it is still our position, that the 40 foot sign requested would be acceptable subject to your determination that the illuminated sign would not violate Section 10.5 of the O'Hare Zoning Regulations. Insofar as a height of 65 feet is concerned, however, we believe it would be necessary for the proponent to file a new Notice of Proposed Construction with the FAA since FAA Case 45 refers exclusively to a sign to be constructed 40 feet above ground level.

As regards Case No. 70-CHI-462-OE, our Department of Development and Planning, in a letter dated June 29, 1970, set forth quite succinctly that the maximum height allowable under the O'Hare Zoning Regulations was 60 feet above ground level rather than the 86 feet requested, and that the City of Chicago objects to the construction of said structure above 60 feet above ground level. Insofar as a variance to 86 feet is concerned, such variance may be granted by your Department upon application therefor. Your attention is directed, however, to a letter dated November 4, 1970, from your Department to the FAA wherein the 86 foot structure was objected to by your Department on the ground that it ". . . would create a hazard to aircraft making instrument approaches to runway 27R.

Since neither of the proposed runway extensions (27R or 22L) were considered in our responses to the FAA Notice of Proposed Construction in both of the above matters, the discussion being solely based upon existing conditions, we see no reason to consider these extensions in a discussion regarding the granting of a variance.

In answer to your question, then, the thinking of the City of Chicago remains unchanged from that submitted to both the FAA and your Department in the letters referred to hereinabove from our Department of Development and Planning. We also appreciate the opinion of your Department as set forth in the letter of November 4, 1970, referred to hereinabove. Since the granting of variances from the applicability of the O'Hare Zoning Regulations are within your province, any decision in this regard must be made by your Department.

In the event you may have misplaced the letters referred to hereinabove, enclosed please find copies of the letters of February 16, 1970, June 29, 1970, and November 4, 1970.

REGULATION OF CONSTRUCTION HEIGHTS AROUND AIRPORTS

(Assistant City Attorney, Salt Lake City Corporation—R. L. H.—June 21, 1973)

Your letter of June 13, 1973, to the City Attorney of Chicago has been referred to the undersigned for reply.

Your letter requests certain information regarding the Chicago ordinance affecting and regulating construction heights around the Chicago airports.

In specific response to your request, the particular ordinance referred to (Section 5.9 of Chapter 194A, Municipal Code of Chicago) only refers to construction within three miles from Chicago-Midway Airport, one of our three airports, and there have been no court challenges to this ordinance.

Procedurally, when proposed construction advice is received from the Federal Aviation Administration, the Notice is forwarded to our Department of Development and Planning which determines whether or not the height proposed meets the aforesaid restrictions. In the event the height exceeds the allowable height, the Zoning Administrator is advised and he then advises the Building Department to not issue a building permit. In the event the proposed construction is outside the Chicago City limits (Chicago-Midway is located less than three miles from the city limits), the Zoning Administrator advises the responsible party in the municipality where the construction is located of the violation of the Chicago ordinance and, to the best of my knowledge, full cooperation has always been given and the only construction allowed is that which does not violate our ordinance.

The second Chicago airport, Meigs Field, is located on our lake front with Lake Michigan on the East and parks on the North and South. This airport is used primarily by small private aircraft and due to this usage and its location, no height restrictions for adjacent construction are in force other than those set forth by the Federal Aviation Administration.

The major Chicago Airport, Chicago-O'Hare International Airport, is handled quite differently and, quite possibly, in a very unique manner. This airport is located in a far northwest extension of the City of Chicago and is almost completely surrounded by a number of small villages. The State of Illinois, Department of Aeronautics, pursuant to Chapter 15½, Secs. 48.1 through 48.37, Illinois Revised Statutes, and specifically Section 48.17 thereof, has promulgated and adopted Zoning Regulations for Chicago-O'Hare International Airport regulating construction heights and land usage around said airport. The Department is also charged with the administration and enforcement of these regulations.

These regulations were adopted, I believe, sometime in 1964, and although there have been a multitude of proposed constructions in proximity of the airport, the restrictive provisions of the regulations have prevailed without any formal court challenges.

I do not have available a copy of these regulations, but I am sure if a request is made to the Director, Department of Aeronautics, State of Illinois, Capitol Airport, Springfield, Illinois, a copy will be forwarded to you.

Basically, then, in answer to your question, height restrictions at both of Chicago's major airports have been enforced for quite sometime and have been complied with without court challenge.

Section C. FRONTAGE CONSENTS

FRONTAGE CONSENTS IN GENERAL MANUFACTURING DISTRICT

(Commissioner of Buildings—A. H.—February 21, 1968)

Your recent letter addressed to Mr. Raymond F. Simon, Corporation Counsel, requesting our opinion as to what action should be taken by your Department with regard to the frontage consents ordinance applying to property located at 1020 W. Hubbard Street, Chicago, Illinois, has been referred to the undersigned for consideration and response.

You have enclosed a copy of a letter written by Attorney Lowell H. Jacobson which states that his client has applied for a building permit at the above-stated location, which is situated within an M2-2 General Manufacturing District, seeking to construct a sausage factory upon the premises, which would be permitted under the Chicago Zoning Ordinance; however, Chapter 40 of the Municipal Code of Chicago, Section 40-5, provides that the type of property use proposed may not be established "without the written consent of the majority of the property owners according to the frontage on both sides of such street or alley." The question presented is whether the frontage consent requirements in a district which is properly zoned for the use being requested remain valid and enforceable in the light of recent Supreme Court decisions, namely, *Drovers Trust and Savings Bank* v. *City of Chicago,* 18 Ill. 2d 476, and *Valkanet* v. *City of Chicago,* 13 Ill. 2d 268.

In the *Drovers* case, the Court held, among other things (18 Ill. 2d at 479):

> "The plaintiff's right to conduct a legitimate business in a district zoned commercial, in which the contemplated business is permitted, can not be left to the whim and caprice of neighboring owners. The procuring or non-procuring of frontage consents has no bearing upon the public health or welfare, and such a requirement is an unwarranted and unauthorizd exercise of the police power.
>
> "This is not to say that the city can not impose separate requirements on this property in addition to zoning restrictions. Other ordinances may validly regulate the manner in which a permitted use is carried on, the way in which buildings are erected or maintained, and the like, but such other ordinances must be reasonably designed to insure standards of health and safety. These frontage-consent provisions do not encompass any governmental objects not already included within the scope of the zoning ordinance, as does a building code or health ordinance."

In a recent opinion rendered by this office to the Commissioner of Health, we said that the frontage consents as related to nursing homes were no longer necessary in view of the *Valkanet* and *Drovers* cases (24 Op. Corp. Counsel 515). We confirm that opinion with respect to the instant matter.

Accordingly, it is our opinion that if all other requisites for building permits meet the requirements of the Municipal Code of Chicago in the instant matter, said permits should issue.

LIQUOR SALES IN RESIDENTIAL DISTRICT— FRONTAGE CONSENTS

(Administrative Assistant to the Mayor—A. H.—October 10, 1969)

Your request for an opinion with respect to the necessity of an applicant's securement of frontage consents when a license permitting the retail sale of alcoholic liquor is to be issued to a location within a residential district, under Paragraph 167 of the Illinois Liquor Control Law (Ill. Rev. Stat. 1967, ch. 43, par. 167), has been referred to the undersigned for consideration and response. You indicate that the above-described property for which a retail liquor license is being sought is located within an R3 General Residence District and that a local community group, Organization for a Better Austin, seeks to enforce Paragraph 167 with respect to the proposed licensed premises.

It should be noted that the property in question has been the subject of recent litigation. One Ernestine Randall sought to secure a Certificate of Occupancy for a tavern on the subject property which was refused by the Zoning Administrator on the ground that the tavern use, which does not conform to the R3 General Residence District zoning, had been discontinued. An appeal from the Zoning Administrator's decision was taken to the Zoning Board of Appeals and was there denied. An administrative review was secured in the Circuit Court of Cook County, *Randall* v. *Zoning Board of Appeals,* docket number 69 L. 5329, and the Zoning Board of Appeals and Zoning Administrator were reversed and directed to issue the Certificate of Occupancy. No appeal has been taken from that determination.

The evidence presented to the Zoning Board of Appeals, and filed as an answer to the complaint for administrative review in the Circuit Court, reveals that the subject property had been used as a tavern and liquor store from 1946 until October, 1968. The owner thereafter leased the property to the plaintiff, said lease to commence on December 1, 1968, and extending to December 31, 1970. Evidence received by the Zoning Board of Appeals included a list of retail liquor license permits for the subject premises starting in 1946 and ending October 31, 1968. Although there was evidence from which an inference could be drawn that the tavern was not in actual operation since August, 1968, the application for a liquor license was made in December of 1968, less than six months later, thereby precluding application of Section 6.5-2 of the Chicago Zoning Ordinance, which requires non-conforming uses that have been discontinued for a period of six consecutive months to conform to the use regulations of the district in which the premises are located. Settled case law interprets the term "discontinued" as evidence of intent on the part of the owner to abandon the non-conforming use. See, *e.g., People ex rel. Delgado* v. *Morris,* 334 Ill. App. 557; *Douglas* v. *Village of Melrose Park,* 389 Ill. 98; *Brown* v. *Gilbert,* 5 Ill.2d 106; and *McCoy* v. *City of Knoxville,* 41 Ill. App.2d 378. No such evidence of an intent to abandon appears in the instant case and, in fact, the evidence is to the contrary, in view of the fact that the lease and application for liquor license were made prior to the expiration of the six month period.

The language of that part of Paragraph 167 which bears upon the issue to which you refer is as follows:

> "In the event a municipality does not vote to prohibit the sale at retail of alcoholic liquor, the council or governing body shall ascertain and determine what portions of the municipality are predominantly residence districts. No license permitting the sale of alcoholic liquors shall be issued by the local liquor commissioner or licensing officer permitting the sale of alcoholic liquors at any place within the residence district so determined, unless the owner or owners of at least two-thirds of the frontage, 200 feet in each direction along the street and streets adjacent to the place of business for which a license is sought, file with the local liquor commissioner or licensing officer, his or their written consent to the use of such place for the sale of alcoholic liquors."

At the time the above-quoted provision of Paragraph 167 was adopted in 1934, the subject property was located within an area zoned as a Commercial District (1923 Chicago Zoning Ordinance, Map 18). Commercial District under Section 8 of that ordinance contemplated the establishment of taverns. In 1942, the 1923 Zoning Ordinance was comprehensively amended and the subject property was contained within a Business District (1942 Chicago Zoning Ordinance, Map 19). Under Section 10 of the 1942 Ordinance, taverns were permitted uses in Business Districts. Thus, when the first tavern was established on the subject property in 1946, it was located within a district zoned for business purposes. In 1957, the 1923 Zoning Ordinance was again comprehensively amended and this time the zoning was changed so that the subject property was located within the R3 General Residence District in which it is situated at present.

The authority to adopt zoning ordinances is contained within Section 11-13-1 of the Municipal Code of Illinois (Ill. Rev. Stat. 1967, ch. 24, par. 11-13-1). In the authorizing statute, municipalities are directed to make ". . . due allowance . . . . for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire municipality and the uses to which the property is devoted at the time of the enactment of such ordinance." The authority delegated to municipalities further provided that said power ". . . shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted, but provisions may be made for the gradual elimination of uses, buildings and structures which are incompatible with the character of the districts in which they are . . . located. . . . ."

In consonance with the foregoing directive, when the 1957 Comprehensive Amendment to the Chicago Zoning Ordinance was adopted, Article 6, Section 6.2, provided that any non-conforming use, building or structure which existed lawfully at the time of the adoption of the amendment or which became non-conforming upon the adoption of the amendment may be continued, subject to the regulations therein provided. Under Section 6.5-4, uses lawfully existing at the time of the Comprehensive Amendment, but permitted only in Business Districts, among others, such as in the instant case (B4-1 Restricted Service District), the amortization schedule therein provided requires the elimination of the non-conforming use within thirteen years of the date of the Comprehensive Amendment, or 1970, if the building is substantially designed or intended for a residential purpose or residential accessory, but if located in a building designed or intended for a use permitted in a Business District it may continue for a period of fifteen years from said date.

As previously noted, the applicant, Ernestine Randall, secured a judgment finding that she was entitled to a Certificate of Occupancy for a tavern ". . . in the basement of an existing three-story brick store and apartment building, . . ." which would appear to indicate that the use may soon be amortized under the terms of Article 6 hereinabove mentioned.

It is our opinion, therefore, that the tavern use having been established on the subject property at a time when the property was zoned for business, rather than residential purposes, is entitled to be continued under the terms of the Chicago Zoning Ordinance until it must be amortized and that Paragraph 167 is not applicable under the zoning history of the property herein involved.

CHAPTER VIII—PUBLIC UTILITIES

Section A. RAILROADS

DISCONTINUANCE OF SERVICE

(S. L.—M. M. M.—September 22, 1967)

Your letter of August 29, 1967 addressed to the Honorable Richard J. Daley, has been referred to the writer for reply. In your letter you express concern over the Illinois Central Railroad's contemplated attempt to close its 91st Street suburban station on the Kensington-Blue Island line.

Please be advised that before the Illinois Central Railroad can discontinue any stop, or close any station, it must file a petition and secure the approval of the Illinois Commerce Commission and must prove that this discontinuance is in the public interest. As of this date the Illinois Central has not filed for any station discontinuances.

Once a petition is filed, if you or any of your neighbors intend to appear to oppose these plans, please contact the writer so that we can arrange to have a coordinated presentation before the Commerce Commission. I might also mention that petitions signed by numerous riders, without the actual physical presence of the riders at the hearing, is of little value.

You can be assured that the Mayor and the Corporation Counsel's office will represent the interests of the Chicago commuters at these hearings and we will do everything within our power to keep these stations open.

EXTENDED BLOCKING OF CROSSING BY RAILROAD

(J. V.—M. M. M.—February 16, 1968)

Your letter of February 7, 1968 to Mayor Richard J. Daley has been referred to the writer for reply. You inquired whether or not there was an ordinance which states how long a railroad can block a crossing.

Please be advised that Chapter 188, Section 49 of the Municipal Code of the City of Chicago prohibits a Railroad from blocking a crossing for more than five minutes and we do prosecute the railroads for violation of the ordinance. Our procedure has been that when a complaint is received we advise the Bureau of Street Traffic who dispatiches an inspector to the site for a 12 hour watch. The inspector notes any violations and forwards them to the Law Department for the filing of a law suit.

We usually do not file suit on the original complaint since the person complaining cannot usually afford the time off from his occupation to attend the court session.

We have scheduled the crossing at Knox and Archer for a 12 hour inspection to determine if the Railroad is continuing to violate the City ordinance.

MAINTENANCE OF CROSSING APPROACHES

(Special Asst. Attorney General—B. R.—November 8, 1968)

We are in receipt of your letter dated October 31, 1968 which was in response to our letter dated April 3, 1968 to Mr. Melvin B. Larsen, Engineer of Local Roads and Streets for the Illinois Division of Highways, regarding the captioned matter.

It is our legal opinion that the Illinois Commerce Commission is without jurisdiction to require the City of Chicago to repair and thereafter maintain the approach leading to a railroad grade crossing which has been found by the Commission to be extra hazardous. Therefore, we cannot recommend the acceptance of the captioned agreement as written.

MAINTENANCE OF CROSSINGS

(Executive Director, United Southwest Community Organization—M. M. M.—August 16, 1967)

Your letter of August 9, 1967 addressed to Mr. Raymond F. Simon, Corporation Counsel, has been referred to the writer for reply.

The maintenance of railroad grade crossings is the responsibility of the particular railroad involved. At the present time, the Department of Streets and Sanitation is conducting a comprehensive program of all railroad grade crossings in the City to insure that they are in a safe condition. When the crossing is found to be in an unsafe condition, as you assert these crossings are, the railroad is notified to repair the crossing. If the railroad unduly delays the repair of said crossings, the matter is taken up with the Illinois Commerce Commission by the City. This procedure will be followed with respect to these crossings and we can expect a reply from the particular railroad within three weeks from the date of our letter.

With respect to the traffic delay at the particular crossings, we have requested the Bureau of Street Traffic to conduct a survey of the traffic delay at these crossings. if the railroad appears to be in violation of either the Municipal Code or State Statute covering the blocking of grade crossings, we will take the appropriate legal action. The traffic delay study by the Bureau of Street Traffic is necessary since, in a court proceeding, a witness must be available to testify to the date, time and place of the blocking of the crossing and from past experience, we have found that the members of the general public are usually unwilling to testify in court or do not have a sufficient recollection of the time or date of the violation.

Please be assured that you will be kept advised of the results of our investigation.

PEDESTRIAN GATES AT RAILROAD GRADE CROSSINGS

(Alderman, 19th Ward—B. R.—February 6, 1968)

Enclosed herewith kindly find a letter, dated February 3, 1969, from Mr. Richard J. Brennan, attorney for the Grand Trunk Western Railroad Company. As you will note from Mr. Brennan's letter, the management of Grand Trunk is of the opininon that the installation of pedestrian gates, at the captioned location, would not protect or promote the public safety.

After discussing this matter with our Bureau of Street Traffic and with personnel of the Illinois Commerce Commission, we must concur with the opinion that, generally, the installation of pedestrian gates, at railroad grade crossings, are not beneficial to the public.

RESPONSIBILITY FOR APPROACHES TO CROSSINGS

(General Attorney, Illinois Northern Railway Company—B. R.—April 10, 1968)

We are in receipt of your letter of April 3, 1968 regarding the captioned matter. You indicated in your letter that the repair of the four railroad grade crossings would commence, weather permitting, as soon as possible with your Railroad's work forces. You also asserted, in the last sentence of your letter, that

the approaches to the said railroad grade crossings would be repaired by the City Bureau of Streets inasmuch as the condition of the approaches is the responsibility of the City.

We would take exception to your latter assertion. Section 58 of the Public Utilities Act (Chap. 111⅔, Ill. Rev. Stat., 1967) in part, provides:

> "Every railroad company operating in the State of Illinois shall construct and maintain every highway grade crossing over its tracks within the State so that the roadway at the intersection shall be flush with the rails, and, unless otherwise ordered by the commission, shall construct and maintain the approaches thereto at a grade of not more than five (5) per cent within the right of way for a distance of not less than twenty-five (25) feet on each side of such tracks; provided, that the grades at the approaches may be maintained in excess of five (5) per cent only when authorized by the Commission".

Based upon the foregoing language of the said Statute, the repair of your Railroad's grade crossings should include that portion of the approaches twenty-five feet on each side of the outer rail.

CITY'S RESPONSIBILITY FOR APPROACHES

(Commissioner of Streets and Sanitation—H. A. C.—October 24, 1967)

In view of the Illinois Supreme Court decision in *McElliogott* v. *Illinois Central Railroad Company*, 37 Ill. 2d 459, a copy of which is enclosed, it may be advisable to review the City's present program of maintenance of streets in and adjacent to railroad grade crossings. This decision tends to modify the basic responsibility of railroads to maintain the grade crossings and approaches thereto.

By virtue of Chapter 114, par. 62, Ill. Rev. Stat. 1963 (Section 8 of "An Act in relation to fencing and operating railroads", enacted in 1874), the railroads were required to construct and maintain their crossings and approaches thereto within their respective rights of way so as to make them safe as to persons and property. Subsequently, the Legislature enacted Section 58 of the Public Utility Act, which defined "approaches" as twenty-five feet on either side of the tracks.

The decision in the aforesaid case, however, tends to limit the responsibility of the railroads to the actual distance to which they maintain their approaches, depending on the physical characteristics of each crossing or on the assertion of control over the crossing, and the factual situation; and, conversely, expands the area of responsibility of the municipality or State to the area over which they maintain or assert control.

In substance if the City as a volunteer regularly infringes on the 25 foot area which the statute describes as the approaches, or performs work in the track area, then there is a possibility that the city could be held liable for injuries to persons or property caused by a failure to maintain an area over which it had asserted control or performed maintenance.

The assertion of control would including painting or striping of approaches, temporary asphalt repairs, long range street reconstruction of the paving, or other maintenance, repairs or surfacing.

DISCONTINUANCE OF SERVICE

(Recorder of Deeds, LaSalle County—M. M. M.—October 25, 1967)

Your letter of October 10, 1967 addressed to the Honorable Richard J. Daley, Mayor, has been referred to the writer for reply. In your letter you expressed concern over the discontinuance of certain passenger train service by the Rock Island and Santa Fe Railroads and requested the Mayor to intervene in opposition to the discontinuance.

Please be advised that it has been the consistent policy of the City's Administration to represent the public interest and to oppose all curtailment of services to the public by public utilities. You can be assured that the City Law Department will appear in opposition to this discontinuance, but in order to present a more effective case, appearances at the hearings by a large number of persons who use the facilities is a necessity. I would therefore suggest that any person wishing to appear at these hearings and testify in opposition, contact the writer and we will arrange for a convenient time in which to present his or her testimony in opposition.

DISCONTINUANCE OF PASSENGER SERVICE AND AIR POLLUTION

(Director, Department of Air Pollution—B. R.—January 12, 1968)

This office is actively engaged, before the Illinois and Interstate Commerce Commissions, in opposing applications by various railroads to discontinue passenger service between Chicago, Illinois and other communities within these United States. We have in our possession approximately eighteen (18) such applications.

Should the railroads, as they have in the past, be successful in eliminating the trains covered by the said applications, more than 150,000 persons will have to seek alternate means of transportation to Chicago. In all likelihood these individuals will travel to Chicago by bus or in their private automobiles.

As you are fully aware, this additional motor vehicular traffic will exacerbate our already serious air pollution problem. We would therefore request that you designate a representative from your Department who would be competent to testify, in the captioned matter, before the Interstate Commerce Commission, as to the aforesaid problem which Chicago would encounter should railroad trains in general and train Nos. 35 and 36 in particular be eliminated. Your designee should contact the writer by no later than January 22, 1968 in order to discuss the preparation of testimony which he shall present before a Hearing Examiner of the Commission on January 29, 1968.

REMODELING OF ILLINOIS CENTRAL RANDOLPH STREET STATION

(Commissioner of Public Works—A. H.—June 26, 1970)

We have your letter seeking to be advised with respect to legal authority for the proposed remodeling of the Illinois Central Railroad Randolph Street suburban station as it may affect City controlled property, as well as the rebuilding of the station entrance at Randolph and Michigan.

You have forwarded to us plans of the existing Randolph Street suburban station area delineating property controlled by the City of Chicago from that controlled by the Illinois Central Railroad under the terms of Section 19 of the 1929 Lake Front Ordinance and Section 10 of the 1919 Lake Point Ordinance, together with proposed plans and photographs for remodeling said areas.

Our examination of Section 19 of the 1929 Ordinance (J. Couns. Proceed. Oct. 24, 1929, p. 1333), reveals that the Illinois Central Railroad was given the right and privilege of using subsurface space under the East Randolph Street viaduct from the existing westerly boundary line of the Michigan Central Railroad Company to the east curb line of North Michigan Avenue for the construction and maintenance of an approach to and as part of the Randolph Street suburban station, with all accessories suitable to accommodate the proper operation of a railroad passenger station and the travelling public using said station, including

connections and entryway to the Randolph Street subway referred to in Section 10(c) of the 1919 Lake Front Ordinance (J. Couns. Proceed. July 21, 1919, pp. 978-79).

The authority thus granted to the Illinois Central Railroad under the 1929 and 1919 Lake Front Ordinances was not withdrawn or modified by the recently adopted 1969 Amendatory Lake Front Ordinance, since Section 27 of the latter Ordinance provides that the amendatory effect of the 1969 Ordinance shall be construed as an amendment to the 1929 and 1919 Lake Front Ordinances only to the extent that said provisions are contrary to or in conflict with the 1969 Amendatory Lake Front Ordinance; and that the Ordinances of 1929 and 1919 not in conflict therewith shall be construed so as to remain in full force and effect, thereby being confirmed, ratified and readopted. Our analysis reveals no such conflict with respect to the proposed remodeling.

In our opinion, therefore, the Illinois Central Railroad Company has the right to remodel its Randolph Street suburban station and entrance in the general manner proposed, with the following provisions:

(1) that all plans necessary for the remodeling be presented to the Commissioner of Public Works of the City of Chicago for approval;

(2) that applicable building permits be secured for structures to be built when falling within Building Code regulations;

(3) that all work necessary to be accomplished shall be done at the sole cost and expense of the Illinois Central Railroad Company; and

(4) that the City of Chicago is understood to retain sole control of the use of all space presently under its control in said areas as shown by the plats forwarded to this office, with the further understanding that the use of all such space under the control of the City of Chicago shall be subject to the exclusive approval of the City of Chicago.

We trust the foregoing will assist you in furthering the detailed studies proposed to be initiated by the Illinois Central Railroad Company in furtherance of its plans. This Department stands ready to render further assistance in this matter should the need arise.

JURISDICTION OVER RAILROAD SAFETY MATTERS

(Alderman, Fifth Ward—M. M. M.—January 24, 1968)

Your letter of January 18, 1968 addressed to the Law Department has been referred to the writer for reply. Your letter recites the fact that a small child was severely injured by an Illinois Central train while she was playing on the tracks. Your letter also states that there was no fence protecting the elevated embankment and that your office had previously notified the Railroad of the condition existing at this location.

Your primary question was, which Governmental Agency, should complaints be made to rectify the dangerous condition which have already been called to the railroad's attention and which they have failed to remedy. The sole question in your situation is that of safety and since 1914 the State Legislature has seen fit to vest the Illinois Commerce Commission with exclusive and plenary powers over matters of safety with respect to the public which involve railroad and other public utilities. Therefore, in order to rectify this situation, it will be necessary to file a petition with the Illinois Commerce Commission seeking an order from the Commission based on public safety under Section 57, Chapter 111⅔ of the Public Utilities Act.

I might call to your attention the Village of Riverdale, in 1956, filed such a petition seeking fencing at a specific location but were unsuccessful in securing an Order from the Commission. It is my understanding that the Riverdale request of 1956 covered a location at grade.

LOCOMOTIVE SAFETY REQUIREMENTS

(J. C. B.—H. A. C.—August 1, 1967)

Your letter of May 15, 1967 has been referred to the writer for reply. In response to your inquiry regarding the existence of City Ordinances pertaining to the captioned matter, we are enclosing a copy of Chapter 188-44 of the Chicago Municipal Code which deals with the said subject matter.

This Ordinance should be read and interpreted in conjunction with Chapter 114, Section 59 of the Illinois Revised Statutes, 1965 (Section 6 of the Railroad and Warehouse Act) which provides:

> "Every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman, at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached."

FENCING OF RAILROAD RIGHT-OF-WAY

(United Southwest Community Organization—M. M. M.—January 11, 1968)

Your letter of November 30, 1967 addressed to Mr. Raymond F. Simon, Corporation Counsel, has been referred to the writer for reply.

Your letter inquired into the responsibility of land owners on property made available for public use. Your specific question was whether or not the Belt Railroad Company was required to fence the right-of-way adjacent to a park owned and operated by a non-profit organization. Please be advised that on any matter affecting the safety of the public which involves railroads and other public utilities, the State Legislature has seen fit to vest the Illinois Commerce Commission with exclusive and plenary powers. Presently the City of Chicago does not have the power to enact an ordinance to require the railroads to fence their right-of-ways.

We have contacted the management of the Belt Railway Company and although they were sympathetic to your problem, they would not agree to erect a fence adjacent to your park since, in their opinion, this would create a precedent whereby they would be deluged with similar requests to fence their right-of-way in other areas. They stated they have no objection to your fencing their right-of-way at your cost. The alternative to your erecting a fence would be filing a petition to the Illinois Commerce Commission seeking an Order of the Commission based on public safety under Section 57 of the Public Utilities Act to require the Belt Railroad to erect a fence adjacent to the park in question. The Village of Riverdale attempted to file such a Petition in 1956 to cover a specific location but was unsuccessful in securing an Order from the Commission.

OBLIGATION OF RAILROAD TO FENCE RIGHT-OF-WAY

(Alderman, 20th Ward—B. R.—August 2, 1967)

Your letter of May 1, 1967, addressed to the Corporation Counsel, Raymond F. Simon, has been referred to the writer for reply. You requested an Opinion as to the obligation of Railroads to fence their own property.

The Illinois Commerce Commission has sole and plenary jurisdiction over Railroad activities when the public safety, convenience and necessity are involved; fencing of the Railroads' right-of-way involves the public safety. Therefore, at the two locations cited in your letter, the Commission would have to be petitioned for the issuance of an Order to obligate the Railroads to fence their own property.

Unless the subject matter of the Petition is impressed with the public interest, the City would be without legal justification for bringing this action before the Illinois Commerce Commission (*City of Wheaton* v. *Chicago A & E Railway Co.* 3 Ill. App. 2d 29 (1954)). After reviewing the complaints attached to your letter, it is our opinion that the public interest is not involved since the installation of fencing would benefit a limited number of private property owners.

Under Section 57 of the Public Utilities Act (Chap. 111⅔ Ill. Rev. Stat., 1965), private parties may Petition the Commission requesting relief as described in your letter.

INSTALLATION OF FLASHING SIGNAL LIGHTS

(Commissioner, Department of Streets and Sanitation—Alderman 19th Ward—M. M. M.—January 19, 1968)

In response to a petition by the City of Chicago filed jointly with the Chicago, Rock Island & Pacific Railroad Company, the Illinois Commerce Commission has authorized and directed the installation of new flashing signal lights and gates at the captioned location. Finding 8 on page 3 provides that the City shall pay 5 per cent of the installation cost but, in no event, shall this cost exceed $497.62.

The Order further provides that the City perform such repairs on the approaches as may be necessary to provide a minimum grade of 5 per cent on the immediate approaches to the crossing and to provide the approaches with a smooth surface. I suggest that your Department contact the Railroad Engineering Department directly so as to coordinate the implementation of this program.

MAINTENANCE OF UNDERPASSES

(General Counsel, The Belt Railway Company of Chicago—M. M. M. —January 16, 1968)

I am writing this letter to confirm our telephone conversation of last week regarding the Illinois Commerce Commission's Order on underpass lighting and the City's present intentions with regard to the completion of the improved lighting in 278 underpasses thereunder together with the maintenance of the lighting in the 830 underpasses.

Please be advised that in my conversations, it was not my intention to convey to you the impression that the City of Chicago is seeking a settlement. At your request, I did, however, suggest a procedure whereby if a substantial majority of the railroads desired to discuss a settlement, it would be properly discussed and presented to the Corporation Counsel, Raymond F. Simon. Further, it is the City's intention to commence the improvement of lighting in all railroad underpasses covered by the Order at once and that we shall immediately take steps to provide the maintenance of all 830 underpasses notwithstanding the fact that certain railroads have filed an application for rehearing or intend to further appeal this matter in the courts.

I trust this accurately reflects your understanding of the conversation you have had with the writer.

POWER OF CITY TO COMPEL REMOVAL OF UTILITY POLES

(Commissioner of Streets and Sanitation—T. A. D.—January 29, 1968)

Your letter of recent date requests an opinion on the right or power of the City to compel the Chicago and Western Indiana Railroad Company to remove its poles in the above mentioned alley.

We have examined the records of the Bureau of Maps and Plats and are of the opinion that a dedicated 15-foot alley exists and that the contention of the Railroad is without legal merit.

The alley in question was originally dedicated as a 14-foot alley on November 9, 1874, in Mary W. Ingram's Subdivision of the N.W.¼ of the S.W.¼ of Sec. 30-37-15. Subsequently, on August 28, 1923, Mary Ingram's Subdivision was re-subdivided into the Ray Quinn & Company's Ford Center, being a Re-subdivision of Blocks 2, 3 and 6, and *E.½ of Block 4 which is the situs of the present controversy.*

The records there indicate that eight (8) feet of the E.½ of Block 4 were dedicated for alley purposes, thus creating the existing 15-foot alley.

The poles were erected by the Chicago and Western Indiana Railroad Company pursuant to an ordinance passed July 18, 1881 for the South Chicago and Western Indiana Railroad Company. Section 2 of that ordinance states, in part, "that permission is granted to the Chicago and Western Indiana Railroad Company to erect and maintain a telepgraph line, but, upon the condition that the poles hereby authorized to be erected shall be placed in such position when they are upon 'any street, highway or alley, as shall be directed by the Board of Trustees or officers of said town'."

In the case of *Postal Telegraph Cable Company of Illinois* v. *Baltimore and Ohio Chicago Terminal Railroad Company,* 219 Ill. App. (1921) p. 304, the Court said:

> "The occupancy of public highways by railroads and telegraph companies is at all times subject to the right of a city to compel relocation of conduits, wires and tracks as the city may see fit to require in a reasonable and just effort to provide for the public health, safety and convenience."

We have been informed that the Chicago and Western Indiana Railroad Company contemplate relocating these poles in conjunction with the building of the new approach for the bridge crossing the Calumet River, in the near future.

MAINTENANCE OF VIADUCT AND UNDERPASSES

(Commissioner of Public Works—B. R.—August 30, 1967)

We are in receipt of your letter of July 12, 1967 addressed to the Corporation Counsel, Raymond F. Simon. You requested an opinion regarding the basic responsibility of the Gulf, Mobile and Ohio Railroad Company to maintain four of its viaduct structures within the City of Chicago.

Section 57 of the Public Utilities Act (Chap. 111⅔ Ill. Rev. Stat., 1965), in part, provides:

> "The Commission shall have power, after a hearing and upon its own motion, or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such a manner as to promote and

safeguard the health and safety of its employees, passengers, customers, and the public. . . .

"Whenever it shall come to the knowledge of the Commission that the equipment or appliances, or the apparatus, tracks, bridges, trestles, or other structures of any common carrier are out of repair or in an unsafe condition, it shall, after an investigation, give notice in writing to the common carrier of the improvements and changes deemed necessary to place the same in a safe condition, and shall recommend to the common carrier that it make such repairs, changes, improvements or new constructions as the Commission shall deem necessary to the safety of person and property being transported thereon".

Based upon the foregoing, it is our opinion that the GM & O Railroad Company has the responsibility to maintain the four viaduct structures heretofore mentioned.

Upon review of the photographs of the said four GM & O viaducts, we concur with the conclusions reached by our consulting engineering firm that each structure is a (1) nuisance to the public (2) dangerous to the public and (3) immediate maintenance is required. If the GM & O persists in its contention that the said viaducts are not in need of immediate repair, we shall, upon your request, file a complaint with the Illinois Commerce Commission pursuant to Section 57 of the Public Utilities Act.

INSTALLATION OF WATER MAIN UNDER RAILROAD TRACKS

(Commissioner, Department of Water and Sewers—M. M. M.—January 19, 1969)

Your letter of January 17, 1969 to Mr. Raymond F. Simon, Corporation Counsel, has been referred to the writer for reply. Your letter sets forth facts that the City proposes to install a 36 inch water main in the North 33 feet of Bryn Mawr Avenue at two locations, where it will be necessary to intersect the right-of-way of the Chicago & North Western Railway. The North Western right-of-way has two existing ground-level tracks at each location.

Your letter requested a legal opinion on the following points:

1. Does the City of Chicago have authority to order the Chicago and North Western Railway Company to remove their tracks to allow open-cut construction?

2. Which agency bears the expenses involved for the track removal?

3. If it is resolved that the subject tracks can not be removed and a tunneling operation must be employed, which agency bears the expense of this method?

Without answering each question individually, it is suffice to say that the rights of public utilities, such as the North Western Railway with facilities located in the streets are subordinate to the rights of the public or the City, in the streets for any purposes consistent with street use. *People* vs. *Chicago City Railway Company,* 324 Ill. 618 (1926). This principle has been extended to apply to the subsurface beneath City streets. *Peoples Light, Gas & Coke Co.* v. *City of Chicago,* 413 Ill. 457 (1953).

We might also note that the area in which you intend to locate your water main has been a dedicated public street since 1968 long before the North Western Railway or its predecessors had any tracks located in the area.

We therefore recommend that you arrange to have a meeting with the Division Engineer of the North Western Railway and advise him that you intend to

commence on an open-cut trench across their right-of-way and that he take steps to protect their property. This would be followed up by a letter advising him of the date of the intended construction.

With respect to the various questions you raise on track removal and tunneling and who should bear the cost; this is an economic question for the North Western Railway to decide, namely, it is cheaper to bridge or relocate tracks during construction or provide the City with a tunnel or metal sleeve so as not to require bridging or track relocation.

Section B. CHICAGO TRANSIT AUTHORITY

DAMAGES CAUSED BY INSTALLATION OF WATER MAIN

(Commissioner, Department of Water and Sewers—H. A. C.—December 7, 1967)

Your letter of October 31, 1967 addressed to Raymond F. Simon, Corporation Counsel, has been referred to the writer for reply. In this letter you request our opinion as to the obligation of the City to pay for removal, relocation, or alteration of properties of the C.T.A. and of public utilities when said removal, etc. is caused by the installation of a new water main in the public way.

The following cases have dealt with this problem:

Brush v. *Commissioner of Internal Revenue,* 81 L. Ed 443.

People v. *Chicago City Ry. Co.,* 324 Ill. 618.

These cases hold that a city cannot surrender its power to control and regulate its streets, and is not liable to compensate companies having a right by ordinance to place their facilities in the streets, for expenses incurred by them in altering or removing their facilities to meet conditions created by the City in making public improvements when the latter are made in a reasonable manner. Furthermore, there is no provision in the C.T.A. franchise which would exempt it from the operation of that legal rule against it.

As to the application of this rule to other city agencies, about which you also inquire, please suggest some definite situation which you have in mind.

CTA PASSENGER USING A TRANSISTOR RADIO

(Alderman 25th Ward, Chairman Committee on Local Transportation—L. H. G.—November 1, 1967)

We are in receipt of your letter in which you ask if the City of Chicago has an ordinance which in effect would restrict passengers in Chicago Transit Trains and Buses from using hand transistor radios. You enclose with your request a letter written to you by Mr. James B. Osgood, 5239 Kenwood Avenue, Chicago, Illinois, in which Mr. Osgood complains that the use of portable radios and record players and playing them without earphones is a serious disturbance to other passengers. He suggests that there should be a rule against such use, and you ask if the City has an ordinance on the subject.

Chapter 111⅓. Utilities, Sec. 331 of Illinois Revised Statutes, 1965, at page 1793 entitled Ordinances, Fines and Penalties provides as follows:

331. (Ordinances-Fines and Penalties.) § 31. "The Board (Chicago Transit Authority) shall have power to pass all ordinances and make all rules and

regulations proper or necessary to regulate the use, operation and maintenance of its property and facilities, and to carry into effect the powers granted to the Authority, with such fines or penalties as may be deemed proper. No fine or penalty shall exceed two hundred dollars ($200.00), and no imprisonment shall exceed six (6) months for one offense. All fines and penalties shall be imposed by ordinances, which shall be published in a newspaper of general circulation published in the metropolitan area. No such ordinance shall take effect until ten days after its publication."

This provision of the above statute gives the duty and power to The Chicago Transit Authority to adopt the type of ordinance you suggest, rather than the City of Chicago. We therefore have no ordinances providing for the regulation of noise within the vehicles of The Chicago Transit Authority, and jurisdiction to do so would be questionable in view of the above cited statute.

CTA DEFINED

(Commissioner, Department of Streets and Sanitation—B. R.—August 2, 1971)

Your letter of July 27, 1971 concerning the captioned matter has been referred to the writer for reply. You inquire as to whether the CTA Rapid Transit Line is considered a railroad.

The CTA is a municipal corporation which owns and operates a transportation system and is therefore not subject to the jurisdiction of the Illinois Commerce Commission. *Chicago District Pipeline Company* vs. *Illinois Commerce Commission* 361 Ill. 296 (1935). In Section 10.5 of the Public Utilities Act, Chap. 111⅔, Ill. Rev. Stat., 1969, the term "Railroad" is defined. This definition would not apply to the CTA since it is not under the purview of that Act.

The CTA was established under the Metropolitan Transit Authority Act, Chap. 111⅔, Ill. Rev. Stat., 1969, Section 301 et. seq. In the said Section of the Act and the Sections following, the CTA is described as a transportation system and not a railroad.

Although the CTA Rapid Transit Line could fall within the definition of Railroad under Section 1-166 of the Illinois Vehicle Code (Chap. 95½, Ill. Rev. Stat., 1969), it is the writer's opinion that a reading of the Public Utilities and Metropolitan Transit Authority Acts indicates the clear legislative intent that the CTA was to be "a municipal corporation for public ownership and operation of a transportation system in the metropolitan area of Cook County and outside thereof" and not a railroad as such.

In the interest of public safety, it might be advisable for the CTA to install and maintain, at its sole expense, the crossing protection alluded to in your letter or, to have City forces perform the said work subject to reimbursement by the CTA.

EXEMPTION OF CTA FROM SPECIAL USE FILING FEE

(Staff Attorney, Chicago Transit Authority—Chairman, Zoning Board of Appeals—H. F. W.—March 13, 1969)

We wish to acknowledge receipt of your recent letter addressed to Mr. Raymond F. Simon, Corporation Counsel of the City of Chicago, in which you request an opinion as to whether the Chicago Transit Authority is exempt from the payment of the one hundred dollar filing fee when it files an application for a special use at the offices of the Zoning Board of Appeals of the City of Chicago.

Section 11.11, Article 11 of the Chicago Zoning Ordinance (Chapter 194A, Municipal Code of Chicago), requires that any application for an amendment

or a special use be accompanied by a filing fee in the amount of one hundred dollars. This section also provides that certain specified governmental and other "duly constituted public bodies" are exempt from the filing fee requirement and reads as follows:

> "Any application for an amendment or special use filed by, or on behalf of, the owner or owners of the property affected shall be accompanied by a fee of one hundred dollars, which shall be paid to the City Collector. There shall be no such fee, however, in the case of applications filed by members of the City Council, the Mayor, Departments of the City of Chicago; or by a duly constituted public body such as, but not limited to, United States Government, State of Illinois, Metropolitan Sanitary District of Greater Chicago, Board of Education of Chicago, Chicago Housing Authority, Chicago Park District and Chicago Public Library".

The question to be answered is whether the Chicago Transit Authority qualified as a "duly constituted public body".

The writer has reviewed the various sections of the Illinois Revised Statutes pertaining to the legislative enactments and creation of the Sanitary District of Chicago (Chapter 42), the Chicago Housing Authority (Chapter 67½), the Chicago Public Library (Chapter 81), the Chicago Park District (Chapter 105), the Chicago Transit Authority (Chapter 111⅔), the Board of Education (Chapter 122) and the Chicago State College (Chapter 144), which statutes include all the "public bodies" mentioned in the ordinance.

Section 3 of the Metropolitan Transit Authority Act (Ill. Rev. Stat. 1967, ch. 111⅔, sec. 303), reads in part ". . . is hereby created a political subdivision, body politic and municipal corporation under the name of Chicago Transit Authority".

Section 3 of the Housing Cooperation Law (Ill. Rev. Stat. 1967, ch. 67½, sec. 30 (c)), reads as follows: "(c) 'State Public Body' shall mean any city, village, incorporated town, county, municipal corporation, commission, district, authority or other subdivision or public body of the State".

Section 2 of an act entitled Validating Acts to Legalize the Creation and Establishment of Housing Authorities (Ill. Rev. Stat. 1967, ch. 67½, sec. 37), reads in part ". . . said housing authorities are hereby constituted and declared to be bodies corporate and politic . . ."

Section 3-24 of the Illinois Drainage Code (Ill. Rev. Stat. 1967, ch. 42, sec. 3-24), reads in part ". . . the district shall become and be a body politic and corporate . . ."

Section 34-2 of The School Code (Ill. Rev. Stat. 1967, ch. 122, sec. 34-2), reads in part as follows: ". . . The district shall be a body politic and corporate . . ."

From a review of the above cited statutes, it appears that the classification of "duly constituted public bodies" as used in Section 11.11 of the Chicago Zoning Ordinance, is a much broader, more general and more inclusive classification than the words and phrases used in the various statutes to create a municipal corporation or a quasi municipal corporation, and in particular the words used in Section 3 of the Metropolitan Transit Authority Act cited above.

For the reasons stated above, it is the opinion of the writer that the Chicago Transit Authority does qualify as and is a "duly constituted public body".

It therefore follows that the Chicago Transit Authority is entitled to the benefit of the exemption provisions specified in Section 11.11 of Chapter 194A of the Municipal Code of Chicago and is not required to pay a filing fee when filing applications for a special use with the Zoning Board of Appeals of the City of Chicago.

CONSTITUTIONALITY OF URBAN TRANSPORTATION DISTRICT ACT

(T. E. K.—R. L. C. and S. R. D.—August 3, 1971)

This appeal involves the constitutionality of the Urban Transportation District Act (Ill. Rev. Stat., 1969, chap. 111⅔, par. 500, et seq.) and the Chicago Urban Transportation District created pursuant to the provisions of the Act.

On April 29, 1970, the City Council of the City of Chicago passed a resolution to create the Chicago Urban Transportation District with boundaries roughly from North Avenue on the North, Ashland Avenue on the West, Stevenson Expressway on the South, and Lake Michigan on the East.

Pursuant to the provisions of the Act, a Special Election was held in the District on June 30, 1970. The resolution carried and on July 7, 1970, Judge Harry G. Comerford entered an order declaring the establishment of the Chicago Urban Transportation District. Emil Caliendo and Page W. T. Stodder were appointed by the Governor of the State of Illinois with the consent of the Senate and Alan S. Boyd and John H. Johnson and Arthur Wirtz were appointed by the Mayor of the City of Chicago with approval by the City Council as the Board of Trustees of the District. All of the foregoing individuals have and are now acting as the Board of Trustees of said District.

The proposed Project will consist of two major subway facilities: (1) a new system which is an east-west high-level "shuttle" or "distributor" subway extending from the University of Illinois Circle Campus via Monroe Street to two branches along the lakefront, which will serve the near northeast area and lakefront activities including McCormick Place; and (2) a conventional subway following the loop pattern under Franklin, Van Buren, Wabash and Randolph Streets, crossing under the State and Dearborn subways. It also includes improved subway connections to the north and west and a connection to the Dan Ryan transit line was completed in 1969.

The Board of Trustees have applied to the United States Department of Transportation for a grant of approximately $500,000,000 which will pay approximately two-thirds of the estimated cost of $750,000,000 of acquiring and constructing the Project. The District intends to issue bonds pursuant to the provisions of Section 13 of the Act in order to pay the balance of the funds necessary in order to acquire and construct the Project.

On February 19, 1971, Edward V. Hanrahan, State's Attorney of Cook County, Illinois, filed a Complaint in Quo Warranto in the Circuit Court of Cook County, Illinois, Case No. 71 L 2259, challenging the right of the members of the Board of Trustees to occupy their respective office and alleging the unconstitutionality of the Urban Transportation District Act and the Chicago Urban Transportation District created pursuant thereto.

On March 19, 1971, Judge Edward J. Egan, one of the Judges of the Circuit Court of Cook County, Illinois, entered judgment sustaining the constitutionality of the Act and the Chicago Urban Transportation District. The plaintiff is appealing from the judgment of Judge Egan.

It is most urgent that the above-entitled cause be set for oral argument at the September, 1971 Term of the Illinois Supreme Court. Until the constitutionality of the Act and the Chicago Urban Transportation District is determined, it is impossible to proceed with the application for Federal Funds, the issuance of bonds by the District and the construction of the Project.

POWERS OF CHICAGO URBAN TRANSPORTATION DISTRICT

(Commissioner, Department of Public Works—H. A. T.—January 4, 1972)

I am an Attorney at Law, duly licensed to practice in the State of Illinois, and an Assistant Corporation Counsel of the City of Chicago. I have duly reviewed the proposal of the Chicago Urban Transportation District to secure a Grant from the State of Illinois, to assist in funding the engineering design of the Chicago Central Area Transit Project.

The Chicago Urban Transportation District was authorized by the Legislature pursuant to Chapter 111⅔, paragraph 501 et seq., of the Ill. Rev. Stats. The procedures to create said District required by the Statutes, were followed, and on July 7, 1970, Judge Harry C. Comerford of the Circuit Court of Cook County duly entered a Finding and Order to that effect. See also, letter addressed to you dated November 3, 1970, prepared by Sydney Drebin, Special Assistant Corporation Counsel.

Paragraph 511 of said Act gives broad powers to Urban Transportation Districts to improve Mass Transportation in its Districts. We deem, applying for and securing a Grant from the State of Illinois to assist in funding the engineering design of the Chicago Central Area Transit Project, well within said broad powers.

There is presently a Chicago Urban Transportation District resolution in effect dated November 13, 1970, which provides that the records of the Chicago Urban Transportation District shall be open to the inspection of any person residing in the District, at all reasonable and proper times. This language is permissive. It does not negate the language of Article 8, Sec. 1-c of the 1970 Constitution of the State of Illinois, nor the language of Chap. 116, Sec. 43.4 to 43.28 inclusive, of the Ill. Rev. Stats. However, if the State requires a resolution stating specifically that the District will comply with the Illinois Constitution and State law, as aforesaid, we see no objection to the adoption of such a Resolution.

Your attention is also called to Sec. 517 of Chap. 111⅔ of the Ill. Rev. Stats., which requires the Auditor General of the State of Illinois to semi-annually audit the books and records of the authority and to provide that such audits will be open to the public for inspection.

CHICAGO URBAN TRANSPORTATION DISTRICT

(Commissioner, Department of Public Works—S. R. D.—November 5, 1970)

In accordance with the telephone request of Mrs. McLean, we are transmitting the following documents:

1. Xerox copy of the Urban Transportation District Act (Ill. Rev. Stat., 1969, Chap. 111⅔, par. 501, et seq.);

2. Xerox copy of Resolution of the City Council of the City of Chicago creating the Chicago Urban Transportation District, passed on April 29, 1970 (C.J., pp. 8421-8422);

3. Certified copy of order entered by Judge Harry G. Comerford on July 7, 1970, finding that all steps necessary for the creation, organization and establishment of the Chicago Urban Transportation District in Cook County, Illinois, as provided in the Act, have been duly and properly complied with and therefore ordering that the results of the Special Election held June 30, 1970 to create and establish the Chicago Urban Transportation District be spread upon the records of the Court and that the territory embraced within the boundaries of the District shall henceforth be deemed as created, organized and established as the Chicago Urban Transportation District.

A certified copy of the order of Judge Comerford was recorded in the Recorder's Office of Cook County on July 7, 1970, in Book 822 of Plats, Page 10, as Document No. 21203059.

Under the provisions of Section 12 of the Urban Transportation District Act (Ill. Rev. Stat., 1969, Chap. 111⅔, par. 512), the Chicago Urban Transportation District has the power to "levy and collect a general tax for corporate purposes on the real and personal property situated in such district, but the aggregate amount of taxes levied for any one year for such corporate purposes shall not exceed the rate of .10 per cent of the value of taxable property as equalized or assessed by the Department of Revenue." Under Section 13 of the Act, the District has the power to issue bonds, "the principal amount of which at any one time outstanding, together with other outstanding indebtedness of the District, shall not exceed 5 per cent of the assessed valuation of all taxable property within the District, as last equalized and determined by the Department of Revenue." The District also has the power to "levy a general tax on the real and personal property situated in the District in an amount sufficient to pay the interest and to pay and discharge the principal within 20 years from the time of contracting said indebtedness." The tax shall be in addition to any other tax authorized to be levied by the District.

We are of the opinion that as of the date hereof the Chicago Urban Transportation District is a legally created municipal corporation, in accordance with the provisions of the Urban Transportation District Act, and entitled to receive a Federal Grant in accordance with the provisions of the Urban Mass Transportation Assistance Act of 1970.

POSSIBLE EXTENSION OF CHICAGO URBAN TRANSPORTATION DISTRICT

(A. S. B.—S. R. D.—April 26, 1972)

We acknowledge receipt of your recent communication in which you state that the Michael Reese Hospital is undertaking a major expansion and has inquired whether the boundaries of the Chicago Urban Transportation District could be extended to include the Hospital, so that the Hospital could be serviced by the transportation facilities of the District.

A study of the Urban Transportation District Act (Ill. Rev. Stat. 1971, ch. 111⅔, par. 501 et seq.) fails to disclose any provision for the extension of the boundaries of a district, either by way of referendum or annexation. The absence of such statutory authority leads to the conclusion that it is prohibited. In *People ex rel. Hansen* vs. *Collins* (1933), 351 Ill. 551, the Court, in construing an Act giving preference to veterans for civil service appointments and employment by the City of Chicago, said (pp. 555-556):

> "It is a general principle of statutory interpretation that the enumeration of certain things implies the exclusion of all other things. (*United States* v. *Arredondo,* 6 Pet. 691: *Sturges* v. *Collector,* 12 Wall. 19" *Arthur* v. *Cunning,* 91 U.S. 362: *Walla Walla* v. *Walla Walla Water Co.,* 172 id.1: *Consolidated Coal Co.* v. *Miller,* 236 Ill. 149: *People's Loan and Homestead Assn. v. Keith,* 153 id. 609). If the legislature had intended to give a preference to veterans not only to obtain employment in the civil service, but also to retain it as against all other employees, without regard to their seniority in service, a provision to that effect would have been incorporated in the statute. This omission is indicative of the legislative intention not to confer the preference of retention in employment claimed by the appellant. The judicial department has no power by interpretation to incorporate into a statute a provision which it does not contain. Such a change or addition can be effected only by a legislative enactment."

Other cases to the same effect are *In re Estate of Leichtenberg* (1956), 7 Ill. 2d 545, *People ex rel. Redfern* v. *Penn Central Co.* (1971), 47 Ill. 2d 412, and *People ex rel. Hanrahan* v. *White*, Illinois Supreme Court #44953, Opinion rendered March 30, 1972.

We are of the opinion, however, that the Urban Transportation District Act could be amended to provide for an extension of the boundaries of a district organized under the provisions of the Act. The amendment could be framed in a manner to meet the requirements of the property owners in the area desiring to become a part of the district.

Section C. OTHER PUBLIC UTILITIES

LIABILITY FOR EXPENSE OF RELOCATING UTILITY FACILITIES

(Commissioner of Public Works—J. K. M.—January 25, 1971)

In answer to your communication of December 11, 1970, with regard to the above captioned matter, it is the opinion of our office that the cost for relocating the Illinois Bell Telephone Company's facilities should be borne by the Telephone Company.

Our opinion is based upon a ruling by the Supreme Court of Illinois under a similar set of circumstances. In the case of *People of the State of Illinois* vs. *Chicago City Railway*, 324 Ill. 618, the City of Chicago embarked on a program of widening a street. Pursuant to this project it was necessary that the Railway Company relocate its tracks to the center of the widened street. The relocation involved an expenditure of about $300,000.00 and it was the Railway's contention that this expense should be paid by the City of Chicago. The City of Chicago denied it was so liable. The Court held that the City's demand that the Railway Company relocate its tracks constituted a valid exercise of the police power of the City and the Railway Company would have to bear the expense.

Since the present case in question is analagous to the situation involved in the earlier Supreme Court decision, it is the opinion of our office that the City of Chicago is not responsible for any expense of the relocation of the Telephone Company's facilities.

LIABILITY FOR COST OF RELOCATING GAS MAIN

(Commissioner of Public Works—H. S.—January 26, 1971)

In answer to your communication of January 16, 1971, with regard to the above captioned matter, it is the opinion of our office that the cost for relocating the Peoples Gas Light and Coke Company's gas main should be borne by the Gas Company.

Our opinion is based upon a ruling by the Supreme Court of Illinois under a similar set of circumstances. In the case of *People of the State of Illinois* vs. *Chicago City Railway*, 324 Ill. 618, the City of Chicago embarked on a program of widening a street. Pursuant to this project it was necessary that the Railway Company relocate its tracks to the center of the widened street. The relocation involved an expenditure of about $300,000.00 and it was the Railway's contention that this expense should be paid by the City of Chicago. The City of Chicago denied it was so liable. The Court held that the City's demand that the Railway Company relocate its tracks constituted a valid exercise of the police power of the City and the Railway Company would have to bear the expense.

A similar decision was made by the Supreme Court of Illinois in the case of *Peoples Gas Light and Coke Company* vs. *City of Chicago,* 413 Ill. p. 457, wherein the Gas Company was obliged to relocate its facilities at its own expense to make way for the construction of the State Street Subway.

Since the present case in question is analagous to the situation involved in the aforementioned Supreme Court decisions, it is the opinion of our office that the City of Chicago is not responsible for any expense of the relocation of the Gas Company's facility.

UTILITY IMPROVEMENT PROGRAMS

(Commissioner, Department of Urban Renewal—T. A. F.—October 2, 1967)

Your letter of August 25, 1967 advises that the Department of Urban Renewal of the City of Chicago is presently developing a program with the Illinois Bell Telephone Company and the Commonwealth Edison Company to relocate their facilities now located in public alleys in Project Central Englewood, from aerial to underground systems. You point out that said relocation is primarily to improve the appearance of the area in accordance with the overall plans for the Project.

You request an opinion on the following questions:

1. May municipalities require a public utility company to remove and relocate its lines located in a public way for aesthetic purposes to an underground location with cost to the City.

2. If the City is obligated to pay all or a part of these costs, are such expenses an eligible, reimburseable project cost under the Federal Urban Renewal Program.

3. Does the City have the authority, under the Urban Renewal Consolidation Act of 1961 to participate in this Utility Improvement Program.

The most recent case in Illinois on the question of requiring a public utility to remove its lines at its own expense, was the Subway Case, Peoples Gas, Light & Coke Company vs. City of Chicago (413 Ill. 437). It was held, in said case, that the City had the right to require a public utility to remove and relocate its lines, at its own expense, in the construction by the City of a Subway Public Transportation System. The Court pointed out that said subway was being constructed for the public welfare and convenience.

The basis for the right of a municipality to require a public utility to relocate its lines is, the inherent police power of a municipality. The police power must not be exercised capriciously or arbitrarily, Chap. 12, Sec. 34.78 McQuillan on municipal corporations. As was said in Northwestern Telephone Company vs. Minneapolis (81 Minn. 140), the City cannot arbitrarily, without necessity or the demands of public convenience, impose additional burdens upon the Company which are clearly beyond the reasonable exercise of the police power.

It is the opinion of Counsel that to require the Commonwealth Edison Company and the Illinois Bell Telephone Company to relocate their utility lines underground, primarily for aesthetic purposes, without just compensation, would be an arbitrary exercise of the police power of the municipality. Question 1 is, therefore, answered by stating that the City could not require the Utilities, under this statement of facts, to relocate their utilities without just compensation.

Question 2 is answered by referring to the language in Chapter 11-1-3 of the Urban Renewal manual which provides, under the heading "Privately-owned Utility" that, where a utility company is not legally required to relocate existing lines underground, Item 1, Project Costs may include compensation to the Company.

Question 3 is answered by stating there is ample authority in the Urban Renewal Consolidation Act of 1961 for a municipality to participate in a Utility Improvement Program for Conservation Projects. See Sections 91.121, 91.122 and 91.125, Chapter 67½ of the Ill. Rev. Stats. (1965).

CHAPTER IX—PUBLIC WAYS

Section A. DEDICATION AND VARIATION

OBLIGATION OF HIGHWAY AGENCIES TO PAY FOR USE OF AIR RIGHTS

(Chief Highway Engineer, Illinois Division of Highways—R. E. W.—February 17, 1969)

Relative to the request for a legal opinion concerning the obligation of the public highway agencies to pay compensation to the Illinois Central Railroad incident to the location of the Southwest Expressway over the subject right-of-way of the railroad, the following is submitted:

It is to be noted at the outset that there would appear to be a basic misunderstanding concerning the decision in the case of *Hickey* v. *Ill. Cent. R. R. Co.*, 35 Ill. 2d 427, (see also 278 F. 2d 627, cert. den., 364 U.S. 918), and the legal consequences and effect of that decision. It is stated in the letter of January 21, 1969, requesting this opinion, that it is understood that the *Hickey* case:

> ". . . resolved only the legal rights to sell and receive payment for airspace used in commercial development over the Illinois Central right-of-way. . . ."

This characterization of the decision, its consequences and effect, is in error. The *Hickey* case was an action for declaratory judgment to quiet title and for a judicial determination that fee simple title to the railroad land was vested in the State, subject, of course, to a railroad easement. *Incident and ancillary* to this primary relief, an injunction was sought to restrain the sale of said property or rights therein by the railroad and an accounting of proceeds from any prior sales. The injunction and accounting was *not* directed to merely air right sales but to *all* sales of any property or interests incident to the alleged absence of fee simple title in the railroad (see *Hickey* case, 35 Ill. 2d 427 at 429-30). The legal effect of the decision was to judicially determine and quiet fee simple title in and to the land in the railroad.

COMPENSABILITY OF AIR-RIGHTS

With the decision in the *Hickey* case declaring and confirming, as a matter of law, fee simple title in the railroad to the very land above which the subject improvement is erected, the duty and obligation of a public body to compensate for the location of the highway over this land and through the air space above it —or worded otherwise, for the acquisition of an air-rights easements, became fixed.

The question of the compensability for the occupation of super-adjacent air space was set to rest in the case of *U.S.* v. *Causby*, 328 U.S. 256 (1946). In that case, merely the temporary passage of aircraft through the air space over the land was involved. In holding that a "taking" of an air-right easement thereby occurred and was compensable under the Fifth Amendment of the Federal Constitution, Mr. Justice Douglas stated at page 264:

> ". . . it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere—The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land (citations omitted) . . . The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material . . . *We would not*

doubt that, if the United States erected an elevated railway over respondent's land . . . there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property *and to limit his exploitation of it.* While the owner does not in any physical manner occupy that stratum of air space or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of air and light is used . . . *We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.*" [Emphasis added]

In the more recent case of *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962), the Supreme Court held that the "taking" of an air easement required the payment by the State agency of just compensation under and virtue of the 14th Amendment to the Federal Constitution. Again the occupation of the air space was temporary, involving only the passage through the air space of the aircraft. In characterizing its earlier *Causby* case on the *Griggs* case, the Supreme Court stated at page 88 that it held in *Causby*:

". . . there had been a 'taking' in the constitutional sense, of an *air easement* for which compensation must be made." [Emphasis added]

In the *Causby* case *supra,* the Supreme Court held that the meaning of "property" as used in the Fifth Amendment, while a federal question, obtained content from local law. In this regard, it has long been held under the law of Illinois that the interest of the fee owner in the immediate reaches of the super-adjacent air space is a property right for which compensation must be made under the State Constitution.

Thus in Illinois Law and Practice, Eminent Domain, Sec. 33, it is stated at page 212:

"The words 'private property' in Section 13 of Article II . . . providing that private property shall not be taken or damaged for public use without just compensation are words of general application and are not confined to any species of property . . . and such provision protects an individual in the ownership of *all* his property." [Emphasis added]

And as more specifically stated in Illinois Law and Practice, *supra,* Sec. 34, p. 213:

"The 'private property' forbidden by the Constitution to be taken or damaged for public use without just compensation is not limited to the tangible subject matter or corpus of the property, but includes the *right of use and enjoyment* and when such a right is destroyed or taken for a public use the owner is entitled to compensation.'

'An easement is property within the protection of the constitutional provision . . . and an owner whose rights of . . . light, *air,* and view are taken away or materially impaired for a public purpose is entitled to just compensation." [Emphasis added]

It is to be observed that long prior to the federal *Causby* case, *supra,* the issue of over head, or air easements was the subject of considerable litigation in Illinois and the compensability of the same had long been judicially established. While it would unduly lengthen this opinion to note all the cases, the following are referred to as exemplary:

Postage Telegraph v. *Eaton,* 170 Ill. 513 (1897)
Illinois Power v. *Talbott,* 321 Ill. 538 (1926)
Illinois Power v. *Parks,* 322 Ill. 313 (1926)
Illinois Power v. *Barnett,* 338 Ill. 499 (1930)
Central Ill. v. *Lee,* 409 Ill. 19 (1951)
City of Chicago v. *Sexton,* 408 Ill. 351 (1951)

Particularly pertinent herein are the *Postal Telegraph* case and *Sexton* case, *supra.* In *Postal Telegraph* air rights above property in which an easement for a public highway already existed was involved, the owner having only the underlying fee to the subject property. The Court stated at page 519 (170 Ill.):

> "The appellee here was the owner of the fee, subject to the easement . . . for a public highway. He had been compensated for this public use . . . but no additional burden could be imposed upon the fee without compensation. When appellant, therefore . . . erected its line without instituting proceedings to condemn, as required by law, it was a trespasser, and no reason appears why appellee might not sue in trespass . . . or bring ejectment and regain his property, . . ."

In the *Sexton* case, *supra,* the specific issue of railroad property, and air rights and eminent domain were involved. As the Court stated at page 355 (408 Ill.):

> ". . . this case presents quite squarely for determination . . . compensation for an easement over property used for railroad purposes."

The City argued in the *Sexton* case, that under Illinois law, the railroad was not entitled to compensation for anything other than valuation for railroad use of the property. In rejecting this position, the Illinois Supreme Court stated at page 357:

> "If . . . the railroad owned the fee simple title to the premises involved, the railroad should be permitted to show the use of this property and property in the immediate vicinity for other than ordinary railroad purposes."

The Court held as reversible error the trial court's ruling striking witnesses' testimony concerning values based on *the use of air rights over the property.* (408 Ill. 351 at 354-5).

Finally, in Illinois there has been specific statutory recognition of air-rights and authority for acquisition by eminent domain, specifically with regard to expressways. Thus, in the Roads and Bridges Act (Ill. Rev. Stats., 1967) Sec. 8-103 provides:

> ". . . authorities . . . shall have the right to acquire by purchase or condemnation . . . all property rights . . . including any rights or easements of access, crossing, light, *air* or view to, from or over the freeway *vested in property not so taken.* . . ." [Emphasis added]

Based on the above, it is the opinion of the Corporation Counsel that there is a legal obligation of the highway agencies to pay compensation for the taking or damaging of property rights, including air rights, of the Illinois Central Railroad incident to the location and construction of the expressway over its subject right-of-way.

PUBLICATION OF INTENT TO ANNEX SURROUNDING TERRITORY

(Chairman, Committee on Finance—R. L. H.—September 5, 1969)

Pursuant to the provisions of Section 7-1-13 of Chapter 24, 1967 Illinois Revised Statutes, it is necessary to publish in a newspaper of general circulation a notice of intent to annex surrounded territory of 60 acres or less.

The publication for the above cited parcels was effected in the Chicago Today newspaper on the 25th day of August, 1969, a copy of said newspaper publication having already been delivered to you.

Attached hereto is the Certificate of Publication from the Chicago American Publishing Company for each of the four publications for these four parcels.

INSTALLATION OF LIGHTING ON NON-DEDICATED STREET

(Commissioner, Department of Streets and Sanitation—B. H. G.—March 3, 1970)

Your recent request to the Corporation Counsel for an opinion as to whether the City of Chicago may install additional street lighting on a public street which has not been dedicated, but has been used as a street since 1919, without any prior action such as securing easements, has been forwarded to the undersigned for reply.

Section 2-104 of the Illinois Highway Code (Ill. Rev. Stat. 1969, Ch. 121, Par. 2-104) defines a municipal street as any existing street established in municipalities. Section 2-207 of the Code states that a street is any highway that is any part of a municipal street system. Section 2-202 of the Code states further that a highway is "any public way for vehicular travel which has been laid out in pursuance of any law . . . or used by the public as a highway for 15 years." Chapter 27, Section 27-1 of the Municipal Code of the City of Chicago defines a street or highway as every way or place other than an alley or bridle path open to the use of the public as a matter of right for purposes of travel.

Therefore, based on the fact that the street in question was opened by an ordinance of the City Council more than 15 years ago, and said roadway is not restricted in its use as a public way, it falls within the definition of a street as found in the above-cited statutes and ordinances.

Section 11-80-4 of the Illinois Municipal Code (Ill. Rev. Stat. 1969, Ch. 24, Par. 11-80-4) grants the corporate authority of each municipality the authority to provide lighting for streets.

Under the facts presented in your letter, that the street in question has been used as a public way since 1919, and in view of the above-cited statutes and ordinances, it is our opinion that the City may install and maintain lighting equipment on the street you have described without any prior action or easements.

ERROR IN LEGAL DESCRIPTION OF PROPERTY

(Chairman, Committee on Finance—J. D. M.—October 25, 1967)

On November 3, 1956, following the entry of a Judgment Order, the City of Chicago was given a deed to the following described property needed for the right of way on the Calumet Skyway:

That part of Block 13 (except that part thereof conveyed to the Lake Shore and Michigan Southern Railroad Company and the Pittsburg, Fort Wayne and Chicago Railroad Company and except the East 220 feet thereof measured on the South line of the said Block 13) lying North of the following described line; beginning at a point on the West line of and being 508.96 feet North of the South West corner of said Block 13; thence South along a curve convex North Easterly and having a radius of 1216.5 feet a distance of 167.87 feet to a point, said point being 409.37 feet North of the South line of said Block 13; thence East along a straight line being 409.37 feet North of and parallel with the South line of said Block 13 a distance of 17.48 feet to the West line of the East 220 feet of said Block 13, all in L. C. Paine Freer's Subdivision of the East half of the North West quarter of Section 22 Township 38 North, Range 14 East of the Third Principal Meridian in Cook County, Illinois.

This parcel was known as 17-12 and the deed was recorded as document No. 16835745.

It has now been ascertained that the legal description in the Judgment Order and the deed were in error, as the description includes a back corner of the Birck-Fellinger Building into the right of way line of the Skyway. It was never the intention of the City to include in the right of way of the Skyway any part of the building and the descriptions submitted by De Leuw, Cather & Company did not include as much as was taken by the city.

Since the error has complicated the legal problems of financing for Birck-Fellinger, Inc., the Law Department of the City of Chicago feels that this obvious error should be corrected. De Leuw, Cather & Company, the Consulting Engineers, concur in this conclusion. A letter from the engineers is forwarded herewith.

We are of the opinion that the Mayor of the City of Chicago and the City Clerk be authorized to deed back to Birck-Fellinger, Inc. the following described real estate:

That part of Parcel S17-12 in Block 13 in L. C. Paine Freer's Subdivision of East one-half of Northwest one-quarter of Section 22, Township 38 North, Range 14 East of the Third Principal Meridian, in Cook County, Illinois, described as follows: begin at a point in the West line of the East 220 feet of said Block 13, said point being 409.37 feet North of the South line of said Block 13; thence West along a straight line being 409.37 feet North of and parallel with the South line of said Block 13, 17.48 feet to a point; thence Northwest along a curve convex Northeasterly and having a radius of 1216.5 feet a distance of 6.49 feet to a point, said point being 414.00 feet North of the South line of said Block 13; thence East along a straight line being 414.00 feet North and parallel with the Southt line of said Block 13 a distance of 22.98 feet to the West line of the East 220 feet of said Block 13, thence South along said West line to the point of beginning.

DEMOLITION AND DAMAGE TO ADJOINING PROPERTY

(Commissioner, Department of Urban Renewal—T. A. F.—March 1, 1968)

Our office has reviewed the report of Consoer, Townsend & Associates together with the report of Mr. Earl Corbin of your office recommending the demolition of a brick stack on the adjoining property and the rebuilding or reinforcing of the common party wall. The issue is whether or not the City of Chicago has a legal obligation to demolish the brick stack and to repair and reinforce the common party wall upon demolition of Parcel 1-1 Lincoln Park. Clearly, the City has the obligation to do both.

There are two fundamental principles in the law determinative of the issue. First, the owner of a party wall has a property interest in the maintenance of said wall. Secondly, a building cannot be demolished in a manner which would cause injury to the property of an adjoining owner.

In the instant case, the owner of the adjoining property by virtue of a party wall agreement executed in 1886, has a real property interest in the maintenance of the party wall. Therefore, it is the legal obligation of the City in demolishing the adjoining structure to restore the party wall to a safe and sighly condition after the demolition.

With respect to the brick stack it is the opinion of Consoer, Townsend & Associates that it must be at least partially demolished prior to the commencement of the demolition of Parcel 1-1 Lincoln Park, in order to avoid possible damage to the adjoining property or persons near the subject property. The City has a legal obligation to avoid any damage to persons or property which directly flow from the act of demolition.

It is my opinion that the City of Chicago has a legal obligation to both shore up the common wall and to remove the stack to avoid damage to the adjoining owner's property interest.

SALE OF PARKING FACILITIES

(Commissioner, Department of Streets and Sanitation—S. R. D.—June 6, 1968)

We acknowledge receipt of your communication of May 24, 1968, referring to our letter of May 17, 1968, in which we reiterated an opinion given to the City Comptroller on May 9, 1968, to the effect that since Parking Lot #70 is "profitable to" the City, Section 7.06 of the Chicago Parking Facility Revenue Bonds Ordinance (C.J. 9-18-52, p. 3161) prohibits the sale of 18 feet of the 150 foot frontage of Parking Lot #70.

Attached to your letter of May 24, 1968, is a communication from De Leuw, Cather & Company dated May 3, 1968, in which they approve, subject to the conditions therein set forth, the sale of the 18 foot frontage of Parking Lot #70. You ask that we reconsider our opinion of May 9, 1968 in the light of the De Leuw, Cather & Company determination.

Section 6.04 of the Chicago Parking Facility Revenue Bonds Ordinance (C.J. 9-18-52, p. 3159) provides that the City "will not permit the sale * * * of any of its parking facilities, or any part thereof," but "the City may sell or dispose of property no longer required for parking facility purposes in accordance with Section 7.06" of the Ordinance.

Section 7.06 of the Chicago Parking Facility Revenue Bonds Ordinance (C.J. 9-18-52, p. 3161) provides, in part, as follows:

> "The City shall have the right to sell or otherwise dispose of any property, real or personal no longer necessary, appropriate or required for the use of, profitable to, or for the best interests of the City operation of its parking facilities as provided by law."

One of the conditions to the sale of a parking facility contained in Section 7.06 is that it is no longer profitable. The April 30, 1968 letter from the City Comptroller stated that Parking Lot #70 produced net operating revenue of $3737 in 1966 and $2290 in 1967. Parking Lot #70 is "profitable" and, therefore, it necessarily follows that it is also "appropriate" as a parking lot. Consequently, before the 18 foot frontage of Parking Lot #70 can be offered for sale, it must be determined that said 18 foot frontage is "no longer necessary * * * or required for the use of, * * * or for the best interest of the City" in the operation of Parking Lot #70. The City Council should make this determination.

Preliminary to the sale of a portion of Parking Lot #70, it is also necessary to comply with the provisions of Section 11-76-2 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, chap. 24, par. 11-76-2) which provides, among other things, for the passage of an ordinance, publication and competitive bidding. We suggest you take the steps necessary to introduce an ordinance to the City Council for the sale of the 18 foot frontage, in accordance with Section 11-76-2. If the City Council determines that the 18 foot frontage is no longer necessary, required or for the best interests of the City and should be sold, it is apparent that the Lincoln Square Savings & Loan Association, which adjoins the 18 foot frontage, would be the only bidder at the sale and, therefore, the sale could not be competitive. Prior to advertising for bids, as provided by Section 11-76-2, it might be advisable to have a discussion as to the procedure to be used in determining the reasonable compensation to be paid for the sale of the 18 foot frontage of Parking Lot #70.

Subject to the conditions set forth in the letter of De Leuw, Cather & Company of May 3, 1968, and the conditions herein set forth, we are of the opinion that the 18 feet of the 150 foot frontage of Parking Lot #70 located at 4715 N. Western Avenue, Chicago, Illinois, may be sold.

COMPENSATION FOR VACATION OF CITY STREETS

(City Comptroller—S. R. D.—April 8, 1968)

We acknowledge receipt of your recent communication requesting an opinion as to whether a reasonable compensation should be paid the City when vacated streets are transferred to the Chicago Park District, State of Illinois, County of Cook or the United States Government. You also ask whether non-profit organizations shall pay the City a reasonable compensation for the vacation of streets and alleys.

A new policy has been invoked to the effect that reasonable compensation shall be paid by all adjoining property owners for the use or vacation of public streets and alleys, regardless of their political or charitable status.

In light of this policy, we are of the opinion that, in the absence of a Cooperation Agreement passed by the City Council, the Chicago Park District, State of Illinois, County of Cook, the United States Government and non-profit organizations, shall pay the City of Chicago reasonable compensation for the vacation of public streets and alleys adjoining their property.

VACATION FOR MEDICAL CENTER COMMISSION PROPERTIES

(Chairman, Local Industries, Streets and Alleys—T. A. D. —December 14, 1967)

In response to the request contained in your letter of October 9, 1967, in the above matter, we have had numerous conferences with Mr. Benjamin Novoselsky, Special Assistant Attorney General, who appeared on behalf of the Medical Center Commission, Mr. Wallace R. Anthon, Superintendent of Maps, and Mr. Harold A. Tepper, Assistant Corporation Counsel from the land Acquisition Division, representing the City's Department of Urban Renewal.

As a consequence, a resolution was adopted by the Medical Center Commission on November 14, 1967, a Xerox copy of which is herewith enclosed.

Said resolution indicates that, on the passage of any ordinances for the vacation of streets and alleys by the City for the Commission, the City is to waive the payment of compensation for said vacations and will further waive any security deposits generally required by the Department of Streets and Sanitation of the City, to assure construction of the necessary curb returns, alley closings, etc.

In consideration of such action by the City, the Commission undertakes that it, or any assignee, lessee or vendee obtaining a conveyance of land in said Medical Center area will pay the costs of closing alleys, streets and openings by construction satisfactory to City and the cost of removal and relocation of all public and private utility lines and equipment within such vacated areas.

As a result of the excellent cooperation afforded us by Messrs. Novoselsky, Tepper and Anthon, we have effected the preparation of an agreement covering the aforementioned conditions and details.

On December 12, 1967, the Medical Center Commission adopted a Supplemental Resolution authorizing execution of the agreement (a Xerox copy of which is also enclosed) hereinabove referred to.

We are, therefore, transmitting for your presentation to the City Council for its consideration, a proposed Council Ordinance providing for the execution thereof by the officials of the Medical Center Commission and the City of Chicago.

Will you kindly advise us if, as and when the said ordinance will have been passed, so that we may proceed to have the agreement duly signed by the appropriate Commission and City officials.

RECORDING OF VACATION ORDINANCE

(Commissioner, Department of Public Works—H. A. T.—January 23, 1973)

Recently you advised this office that the Cook County Recorder has refused to record a City ordinance vacating an alley as not being in compliance with Chapter 109, Sections 6 and 7 of the Illinois Revised Statutes. Said Sections require the approval of the Highway Commissioner, the County Superintendent of Highways and the District Engineer of Public Works to approve vacation of Plats.

Chapter 109 of the Illinois Revised Statutes is commonly referred to as the Plat Act. Sections 6 and 7 of said Act refer to the vacation of *Plats.* The heading of Section 6 is Vacation of Plats. The Section begins "any *Plat* may be vacated by the owner of the premises at any time before the sale of any lot therein". . . . The heading of Section 7 is Vacation of Part of a Plat and begins "any *part* of a *Plat* may be vacated". . . . Personnel of the Recorder's office have recently extended the meaning of said Sections to include vacation ordinances.

The Statutory provisions covering the rights of municipalities to vacate City streets and alleys are found in Chapter 24, Sections 11-91-1 and 11-91-2 (Cities and Villages Act). These provisions grant Cities the unqualified power to vacate streets and alleys within their jurisdiction. There is no requirement concerning Plats in said Act. Chapter 109, Section 6 and 7 and Chapter 24, Sections 11-91-1 and 11-91-2 are not conflicting. Chapter 109 simply is not applicable and does not refer to ordinances of vacation.

We are advised that to aid the County Recorder in properly recording vacation ordinances, the City Map Department has furnished the Recorder with drawings and legal descriptions defining the vacation area. Said ordinances have incorporated these drawings by referring to them as Plats. This would tend to confuse the Recorder's office.

We recommend that the Map Department use the word "drawing" or similar nomenclature in said ordinances to avoid further misunderstanding with the Recorder's office.

Section B. USE OF STREETS, ALLEYS AND SIDEWALKS

CONSTRUCTION OF STRUCTURES ON AND UNDER PUBLIC WAYS

(Commissioner, Department of Public Works—J. R. P.—June 22, 1968)

Concerning your letter of June 21, 1968, wherein you request an opinion concerning the possibility of waiver of the bond and fee by the Comptroller for the Chicago & Northwestern Railway Company for the enclosed walkway they intend to provide over the public sidewalk on Clinton Street from the Northwest track platform level to the C.T.A. "L" Station, please be advised that the Municipal Code of the City of Chicago, Chapter 34, §34.1 states:

> "No person shall construct or maintain any bay window, bridge, wire, pipe or other structure or device over any public way or any public place . . .

without first having obtained specific authority by Ordinance passed by the City Council authorizing such special privilege."

The above citation is taken from the general requirements section of Chapter 34 "Structures on and under Public Ways". There follows thereafter in that chapter requirements for specific items such as newsstands, canopies, lamps, sub-sidewalk space, etc. which items occur frequently throughout the City. Most of the specific structures, however, require a bond and permit fee by Ordinance, with direction to various City officials for execution.

A unique item, such as is being proposed by the Chicago & Northwestern Railway Company, would come under the general requirements of said Chapter 34 and would require a separate Ordinance which, we presume, would cover the matter of bond, permit fee and their execution.

CONSTRUCTION OF BUS SHELTERS

(Commissioner of Streets and Sanitation—R. L. C.—March 27, 1968)

This office is in receipt of your letter of March 19, 1968 forwarding a roll of construction drawings for bus shelters and requesting that the Bus Shelter Committee (???) be given the benefit of our "review" and "comment".

The drawings prepared and submitted by Montgomery Ward indicate four bus shelters to be located at the intersection of W. Chicago Avenue and N. Larrabee Street. Although the plans do not specifically so state, they seem to indicate that the proposed shelters will be located upon the existing sidewalks which I must assume to be public, as distinguished from private, property.

The power given to City Councils over streets and sidewalks is very broad. *Jacobs* v. *City of Chicago,* 244 Ill. App. 132. The City Council may regulate the use of streets and alleys to the extent that it may require sidewalks exclusively reserved for use by pedestrians. *City of Chicago* v. *Collins,* 175 Ill. 445. Specifically, that power includes, among others, authority "to prevent and remove encroachments or obstructions upon the streets and other municipal property". Chapter 24, Section 11-80-3, Ill. Rev. Stats. (1967).

In the exercise of this power, the City Council has enacted Section 34-3 of the Municipal Code which provides as follows :

> "No person shall erect or place *any* building *or other structure,* in whole or in part, upon any public way or other public ground within the city, and every person who violates or fails to comply with the provisions of this section shall be fined not less than $25.00 nor more than $200.00 for each offense."

There is no question that a sidewalk is a public way and little doubt that the bus shelters in question qualify as "structure" within the meaning of the above ordinance. For this reason, it is clear that Montgomery Ward has no right to construct such shelters and neither your department nor the Bus Shelter Committee has authority to grant such right.

If such shelters are deemed to be in the public interest, authority for the construction thereof will need be specifically secured in each instance by ordinance of the City Council granting a privilege in the public way. It will also be required that plans for the construction thereof be submitted to the Building Department and that a building permit for this type "structure" be secured.

I am returning herewith the aforementioned roll of construction drawings, together with four photographs of the area involved which were received under cover of your letter of March 26, 1968.

CHARITABLE SALES ON PUBLIC WAYS

(Executive Director, Hemophilia Foundation—A. H.—April 29, 1968)

Your recent communication addressed to Mr. Raymond F. Simon, Corporation Counsel of the City of Chicago, concerning your proposed sale of candy for charitable purposes on the public ways in the downtown area of the City of Chicago, has been referred to the undersigned for consideration and response.

Activities in the nature of selling tags for charitable purposes on the public ways of the City are prohibited except as they conform to the provisions of the Municipal Code of Chicago, Chapter 36, Sections 36-11 through 36-18. Furthermore, activities such as the sale of peanuts, etc., on the public ways of the City, with proceeds to go for charitable purposes such as you suggest, must be authorized by order of the City Council. See, *e.g.*, Municipal Code of Chicago, Chapter 160, Section 160-13.2.

We must regretfully inform you, therefore, that in the absence of authority granted by the City Council to engage in said activities, the Psi Kappa Service Fraternity, on behalf of the Hemophilia Foundation would not be authorized to sell candy on the public ways of the City.

ERECTION OF FLAGPOLES WITHIN LAKE SHORE DRIVE

(Commissioner, Department of Streets and Sanitation—F. P. K.—April 25, 1972)

Receipt of your letter of March 20, 1972, regarding a request by the Metropolitan Fair and Exposition Authority to erect three (3) flagpoles on a parkway within the right-of-way of Lake Shore Drive immediately west of McCormick Place is hereby acknowledged.

The attached engineering drawing, which indicates the approximate flagpole locations, shows that the subject parkway is a triangular shaped island located between the southbound exit ramp and the northbound entrance ramp from 23rd Street. The island is improved by a ten foot wide sidewalk in its center which covers almost its entire length. The subject flagpoles would be erected immediately adjacent to the east side of the sidewalk.

You ask for a legal opinion as to whose responsibility the maintenance of these poles would be if erected, and which agency would be liable in case these poles were damaged, as in the case of a traffic accident.

Ownership and control of this particular section of Lake Shore Drive was transferred to the City of Chicago from the Chicago Park District on January 1, 1959, pursuant to Ill. Rev. Stat. 1971, Ch. 105, Sec. 333.51 *et seq.*, under which the City assumed jurisdiction and control of public ways theretofore under jurisdiction and control of the Chicago Park District. Therefore, the parkway island is owned and controlled by the City.

It is axiomatic that municipal corporations are required to exercise ordinary care to maintain their streets and sidewalks in a reasonably safe condition for travel in the usual modes by day and night, and this applies to both acts of *commission* and omission. This obligation is permanent and cannot either directly or indirectly be shifted or abrogated in whole or in part. Nor may a municipality in any way surrender or impair its control over streets. *McQuillan Municipal Corporations* (3rd Ed.), Vol. 10, Sec. 30.73, p. 804, *Peoples Gas Light and Coke Co.* v. *City of Chicago,* 413 Ill. 457, 107 N.E. 2 777.

The general nature of the Metropolitan Fair and Exposition Authority (hereinafter referred to as the "Authority") has been described in a previous opinion

Vol. 25, pp. 210-211. The Authority is the managing corporation of McCormick Place and derives its authority from an act designated by the same name. (Ill. Rev. Stat. 1971, Ch. 85 pars. 1221-1248.) It is a quasi-municipal corporation, and among its delegated powers are that it may own or lease property, sue and be sued in its own name, enact ordinances and impose penalties, promote, operate and maintain fairs and conventions, procure and enter contracts, and other similar powers necessary to attain its purposes. Notably, Paragraph 1229 grants authority to enter into contracts of insurance and indemnity.

Of itself, the Authority has no right to erect the subject flagpoles on the parkway island which is property owned, controlled and maintained by the City. City permission is required.

As contemplated, the flagpoles would constitute permanent, fixed obstructions which would not have any relation to traffic or proper use of the street, and would constitute permanent encroachments.

The grant of a use of a public way inconsistent with the use by the public is void. *Smith* v. *McDowell,* 148 Ill. 51, 35 N.E. 141; *Chicago B. & Q. R. Co.* v. *Quincy,* 136 Ill. 489, 21 N.E. 232; *McQuillan Municipal Corporations* (3rd Ed.) Vol. 10, Section 30.73, p. 817.

In Illinois, the Supreme Court has consistently held that a municipality has no power or authority to grant the exclusive use or control of any part of the highway to any private person or for any private purpose. *People* v. *Corn Products Refining Co.,* 286 Ill. 226, 121 N.E. 574; *Chicago Cold Storage Co.* v. *People,* 224 Ill. 287, 79 N.E. 692; *Pennsylvania Co.* v. *City of Chicago,* 181 Ill. 289, 54 N.E. 825.

In the case of *People* v. *Walker,* 350 Ill. 461 (1932), the court had under consideration a city ordinance leasing a portion of a parkway for the erection and maintenance of gasoline pumps. In holding the ordinance void the court stated at page 466:

> "A permanent encroachment upon streets for private use is a purpresture and is in law a nuisance (*Hibbard & Co.* v. *City of Chicago,* 173 Ill. 91; . . . "Power of a city to authorize the use of public streets for private purposes has been uniformly denied by this Court. When a public street is once established, all beneficial uses vest in the public. These include the uninterrupted and unobstructed use of any portion or part of such public highway. These rights of the public are inconsistent with the right of a private citizen to encroach upon the streets by the erection of a permanent structure. Streets are held in trust by the municipality for the benefit of the public and may not be given away by ordinance (*People* v. *Corn Products Co.* 286 Ill. 226; *Tolman* v. *City of Chicago,* 240 Ill. 268."

Based on the foregoing, it is our opinion that the City of Chicago has no authority to permit the Metropolitan Fair and Exposition Authority to erect the three (3) subject flagpoles on an island in Lake Shore Drive.

The questions of responsibility for maintenance and responsibility for tort liability are not considered since denial of a permit for erection of the flagpoles effectively precludes any such necessity.

LOADING ZONE FEE

(Corporation Counsel, City and County of Honolulu—F. J. D.—March 9, 1973)

Your letter dated February 13, 1973, addressed to the City Attorney, Chicago, Illinois, was forwarded to Richard L. Curry, Corporation Counsel of the City of Chicago, who assigned the writer to reply to same. Your letter requested information concerning the enabling statutes authorizing fees assessed applicants for loading zones in the City of Chicago.

Under a provision (Article VII, Chapter 6, "Powers of Home Rule Units") of the Illinois Constitution of 1970 a Home Rule Unit (i.e., "a county which has a chief executive officer elected by the electors of the County and any municipality which has a population of more than 25,000") may ". . . exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." A further grant under our Cities and Villages Act (Illinois Revised Statutes, Chapter 24, Section 11-80-2) recites that ". . . [T]he corporate authorities of each municipality may regulate the use of the streets and other municipal property."

In respect, then, to the foregoing grants of authority THE CITY OF CHICAGO, a Municipal Corporation and Home Rule Unit, enacted the following ordinance which is presently in full force and effect:

> "27-411 No sign shall be erected by the commissioner of streets and sanitation upon the special request of the owner, agent, or lessee of any building for the specific purpose of designating a curb loading zone or prohibited parking space in front of the entrance to such building, or in front of the property upon which such building is located until said owner, agent, or lessee has paid into the city treasury a fee of fifteen dollars for each sign to be erected which shall include maintenance for such sign for a period of one year from date of erection. The commissioner of streets and sanitation shall not maintain any such sign after one year from the date of erection unless the owner, agent, or lessee shall pay into the city treasury a fee of ten dollars in advance annually for the maintenance of such sign and said commissioner shall remove such sign when the payment of yearly maintenance fees on such sign shall be thirty days in arrears. Said commissioner may also remove any such sign whenever public convenience or necessity warrants the same after fifteen days' notice of such intended removal is given to said owner, agent, or lessee. The fees required herein shall not apply to the erection of signs in front of any public building as defined herein, or in front of any theatre, school or church."

LOOP PEDESTRIAN MALL

(Chairman, Pedestrian Mall Task Force, Department of Streets and Sanitation—J. R. P.—April 19, 1971)

With regard to your request for a legal insert into the Loop Mall Study Report, we submit the following:

The Corporate authorities of each municipality may regulate the use of the streets and other municipal property. Illinois Revised Statutes, Chapter 24, Section 11-80-2.

With regard to this statute the Courts have said that the discretion of the City Council respecting necessity for and construction of improvements in streets when honestly and reasonably exercised, is conclusive. *People ex rel Lyddy* vs. *City of Rock Island,* 45 Ill. App. 2d 76.

On the other hand, the abutting property owner's right of access to public streets adjoining his property is a valuable property right which cannot be taken without just compensation. *Salem National Bank* vs. *City of Salem,* 47 Ill. App. 2d 279.

It is our opinion that closing a street for a one-day trial, exclusive of areas in which businesses are served by driveways, is a legitimate and reasonable exercise of the powers of the Corporate authorities.

SALE OF NEWSPAPERS

(Superintendent of Police—R. J. E.—July 11, 1969)

Please be advised that on April 25, 1969, the City Council of the City of Chicago passed an ordinance (Council Journal Proceedings p. 5364) a copy of which is attached hereto, which amends Chapter 36 Section 36-49.1 of the Municipal Code of Chicago by striking the word "daily" appearing on Line 2 of said section.

The ordinance now permits the sale of all newspapers which would include such newspapers as The Seed and The Kaleidoscope on the public ways in all areas of the city.

This ordinance took effect on May 5, 1969. It is recommended that all appropriate personnel be advised as to the above premises.

CALUMET SKYWAY—PARKING AREAS

(City Comptroller—W. M. Z.—September 12, 1968)

Please refer to your communication of August 26, 1968, which reads as follows:

> "This office has a request from the DeNormandie Towel and Linen Supply Company for proposed parking areas under and adjoining the Calumet Skyway at approximately Anthony Avenue and Dante Avenue. Please advise if the City of Chicago is authorized to grant such lease."

It is our opinion that the City is not authorized to grant such leases. We have made a title search of the property and an examination of the ordinances pertaining to this matter.

May we call your attention to Section 6.04, heading:

> "Against Encumbrances, Sale or Lease of Said Bridge. The City covenants that it will not create or give, or permit the creation or giving of any mortgage, lien or pledge on any City-owned personal or real property or equipment constructed, purchased or used in connection with or related to said Bridge and the operation thereof or upon any Revenues or other funds pledged or held hereunder, except as security for all the Bonds issued hereunder, and that it will not permit the sale, lease or other disposition of said Bridge, or any part thereof, but the City may sell or dispose of property no longer required for said Bridge in accordance with Section 7.05 hereof."

We further wish to call to your attention to Section 6.06:

> "Limitation upon Amendatory Ordinances. The City shall not adopt any Ordinance or take any action or proceeding for the purpose of amending, altering or modifying any of the provisions of the Ordinance, except in the manner and subject to the limitations set forth in the Ordinance and with approval of the holders of 66⅔ in principal amount of all of the Bonds then outstanding."

PICKETING AND ASSEMBLY

(G. B. B.—R. J. E.—September 15, 1969)

The Commissioner of Streets and Sanitation has referred your application for a public assembly permit to this office for reply.

Please be advised that the Chicago Parade and Assembly Ordinance as amended May 14, 1969 does not apply to the conduct and activity set forth in your application of September 12, 1969.

Your request is for the peaceable assembly of 60 to 100 marchers on the sidewalk only in front of 4511 South Kedzie and 330 North Wells. Picketing and assembling in a peaceful manner on the sidewalks in the City of Chicago is not the subject matter of regulation by way of permit so long as there is no obstruction or interference with ingress and egress to property or with pedestrian traffic.

Inasmuch as your request does not fall within the purview of Chapter 36-31 of the Municipal Code relating to parades and assemblies, on behalf of the Commissioner of Streets and Sanitation you are hereby notified that your application for a permit is denied.

It would be advisable that you notify the Chicago Police Department each day you intend to picket and demonstrate so that your rights to do so may be protected and preserved.

EXCLUSIVE RIGHT TO USE CITY PROPERTY

(Judge of the Circuit Court of Cook County—S. R. D.—October 30, 1967)

In a recent communication, you have requested our opinion as to whether or not the Shriners of North America, who will hold their annual convention in the City of Chicago during July, 1968, may erect bleachers "on the east side of Michigan Avenue, on the sidewalk, wherever possible, between Randolph Street and Columbus Drive and charge $2.00 per person for a seat on the bleachers."

It is established law that a municipality cannot grant to any corporation or individual an exclusive right to use a street or any part thereof for a private purpose. In *City of Chicago* v. *Verdon* (1905), 119 Ill. App. 494, the court said, p. 496:

> "The city has no power by permit, ordinance or otherwise to convert or appropriate any portion of the sidewalks upon public streets for private use. The streets are held and controlled in trust for the use of the general public, and 'no corporation or individual can acquire an exclusive right to their use, or to the use of any part of them for private purposes'."

In *City of Chicago* v. *Rhine* (1936), 363 Ill. 619, the court, in discussing the duty of a municipality to keep its streets free of obstructions, said (p. 622):

> "The basic purpose of a street is to afford a way for traffic, both pedestrian and vehicular, to the public, and the public is rightfully entitled to the use of such thoroughfare free of all obstructions and impedimenta which tend to delay or obstruct traffic or annoy the public in the use of the streets. (*City of Chicago* v. *Collins*, supra p. 455; *City of Chicago* v. *McKinley*, 344 Ill. 297, 304). It is the duty of the city to maintain its streets in such condition that the public shall at all times have the unobstructed use thereof."

Although a municipality has been given legislative authority to regulate the use of its streets and sidewalks (Ill. Rev. Stat. 1965, chap. 24, pars. 11-80-1 to 11-80-22, inc.), the City Council has not enacted an ordinance which would permit the use of bleachers as contemplated by the Shriners of North America.

We are of the opinion that the City officials do not have the authority to permit the Shriners of North America to install bleachers on the east side of Michigan Avenue, between Randolph Street and Columbus Drive, Chicago, and charge $2.00 per person for a seat during their annual convention to be held in July 1968.

REGULATION OF DOOR-TO-DOOR SALESMEN

(City Attorney, City of Dallas—D. P.—July 14, 1969)

Your letter to the Corporation Counsel requesting information concerning public regulation of door-to-door salesmen has been referred to the undersigned for response.

Enclosed for your consideration are copies of Chapters 141 and 160 of the Municipal Code of Chicago dealing, respectively, with itinerant merchants and peddlers. Both are regularly enforced by the Department of Police, apparently without serious problems.

According to your letter, your principal area of concern is the dissemination of doctrines not in the best interest of the city. The ordinances enclosed appear to be concerned more with the problems of commercial exploitation or of traffic congestion, than with other broad areas of public order. Nevertheless, they are forwarded so that you may determine whether, and to what extent, they are applicable to your situation.

LIABILITY OF CITY FOR DAMAGE CAUSED TO HEATING SYSTEM UNDER SIDEWALK

(Commissioner, Department of Water and Sewers—J. K. M.—December 8, 1967)

In reply to your request for an opinion as to the liability of the City of Chicago for damage caused by City employees to radiant heating systems under sidewalks, it is our opinion the City of Chicago would not be liable for this damage. Chapter 34.1 of the Municipal Code of the City of Chicago provides:

> "No person shall install or maintain any wire, pipe or conduit underneath the surface of any public way or other public place without first having obtained specific authority by ordinance passed by the City Council authorizing such special privilege."

In consultation with personnel from the Department of Streets and Sanitation, I have been advised that when landowners apply for a sidewalk permit to construct a new sidewalk adjacent to their property and in which they intend to provide an underground heating system, in only about 1 in 100 applications is the Department of Streets and Sanitation ever even advised that the landowner intends to install a radiant heating system.

Chapter 33-23 of the Municipal Code requires that any person who builds, rebuilds, removes, repairs or in any manner disturbs any sidewalk, must first obtain a permit from the Department of Streets and Sanitation specifying *the work to be done.* In 99 out of 100 cases the property owner installing said underground system has not complied to the provisions of the City Code. Chapter 33-23 further provides that any violation of the terms of such permit shall render the same null and void. It is our opinion, therefore, that in cases where the City has not been notified at the time of permit application that an underground radiant heating system is intended to be installed, the installation of such system amounts to a trespass upon City property and therefore no duty of reasonable care is owed to the property owner. Even in cases where the Department of Streets and Sanitation has been given notice that such system is to be installed, it is still doubtful whether the landowner has removed his system from the classification of being a trespasser by the above-cited requirements set out in Chapter 34.1 of the Municipal Code.

In situations where we are advised that the landowner intends to install an underground radiant system, I believe that a provision could be written into the permit exempting the City from any liability as a result of damage caused to said system by City employees. Under these circumstances, the City would be absolutely not liable. This is a matter I feel should be investigated.

In regard to the damage at 1771 W. Howard Street, the driver of the auto is definitely liable for the damage to the heating system since his act of damaging the fire hydrant set into action the later events which caused damage to the heating system. The property owner should be advised to file a claim against the driver of the auto.

CONSTRUCTION OF ELEVATED WALKWAYS

(Commissioner, Department of Public Works—J. R. P.—August 9, 1968)

Forwarded herewith are five (5) copies of a proposed Ordinance granting the Chicago & Northwestern Railway Company the privilege of constructing etc. the elevated walkway at Clinton & Lake Street over the public sidewalk.

We have included provisions in blank for the compensation and bond for the City Council's consideration. Our former opinion dated July 22, 1968, indicated the granting of authority for the use of the public space was the City Council's prerogative. The City Council has authority as grantor in such matters by virtue of Chapter 24, Illinois Revised Statutes, 1967:

> "¶ 11-80-8 The corporate authorities of each municipality may regulate the use of the space over the streets, alleys, other municipal property, and public places of the city, and upon payment of proper compensation, to be fixed by ordinance, may permit the use of the space more than 12 feet above the level of such streets, alleys, property or places, except for purely private uses."

Section 1. of said Ordinance refers to a location plan which should be forwarded with said Ordinance to the City Council. We suggest in this regard that the overall length and width of the walkway, and the size and location of the supporting steel columns be shown on the plan.

RESPONSIBILITY FOR SIDEWALK MAINTENANCE

(C. G. Caster Co.—M. S. J.—July 3, 1967)

Your recent inquiry directed to the Department of Streets and Sanitation has been referred to the office of the Corporation Counsel, City of Chicago, for reply. You ask for a copy of the city ordinance outlining the responsibility for the landowner with respect to maintenance of a public sidewalk in front of their respective homes.

The Illinois General Assembly has delegated the function of regulating the use of sidewalks and their construction and repair to the local municipalities (See Ill. Rev. Stat. 1965, ch. 24, par. 11-80-13). The City of Chicago, acting pursuant to this enabling legislation, in Chapter 14, Section 14-4 of the Municipal Code of Chicago, sets forth the maintenance provisions.

The provision for costs for construction and repair of sidewalks is located in Chapter 24, Illinois Revised Statutes (1965), paragraphs 11-84-1 to 11-84-8, wherein provisions for special taxes and special assessments are set forth. In the Municipal Code of Chicago, Chapter 36, Section 36-19 and Chapter 101, Section 101-29.1 provisions are set forth for the removal of snow and ice upon the public way and for the avoidance of litter by the owner, occupier, lessee, etc.

SIDEWALK MAINTENANCE— ACCUMULATIONS OF SNOW AND ICE

(Director, Department of Human Resources—F. V. K.—March 30, 1970)

We are in receipt of your letter of February 19, 1970, requesting information concerning sidewalk maintenance ordinances with respect to accumulations of snow and ice.

These ordinances are found at Chapter 36, Section 36-19, and Chapter 101, Section 101-29.1 of the Municipal Code of Chicago, copies of which are herewith enclosed. Section 36-19 deals with the clearance of accumulations of ice and snow from sidewalks by every owner, lessee, tenant, occupant or other person having charge of any building or lot of ground that abuts the public way, or any public place. Section 101-29.1 deals with the duty of those licensed to do business by the City of Chicago to remove ice and snow from the sidewalks in front of their city licensed business premises.

It must be noted, however, that through a series of decisions of the Illinois Supreme Court, Section 36-19 is virtually unenforceable. See, *i.e., Gridley* v. *City of Bloomington* 88 Ill. 554; and *City of Chicago* v. *O'Brien* 111 Ill. 532. In *City of Chicago* v. *Union Traction Co.,* 199, Ill. 259 the Supreme Court stated:

> "The owner of property abutting on a street has no interest in a street of a city, as a street, other than that possessed by every other citizen. . . . The burden however of keeping the sidewalk or street clear of snow, ice or other accumulations is a public burden, and no obligation is imposed on the lot owner to perform that which is the duty of the municipality as representative of the public to perform. The lot owner has no special right, benefit or interest in the street in front of his premises."

The above quoted rationale does not apply to Section 101-29.1 which deals with the removal of snow and ice from sidewalks in front of city licensed business premises. Illinois courts have held that a license is a personal privilege to do what would otherwise be unlawful and carries with it no vested property right. See e.g. *Weinstein* v. *Daley,* 85 Ill. App. 2d 470. Since a license is a privilege granted by the municipality there appears to be no reason to curtail the power of the City of Chicago to make reasonable regulations for the conduct of the businesses it licenses. Therefore, Section 101-29.1 would be enforceable against premises falling within the purview of the ordinance.

MAINTENANCE OF VAULTED SIDEWALKS

(Commissioner of Streets & Sanitation—J. K. M.—April 23, 1971)

It is the opinion of our office that the present owner of the above premises is responsible for the maintenance of the vaulted sidewalk, even though said vault has been sealed, is no longer utilized, and no permit for the use of said space has ever been applied for by the present owner.

Our reasoning for this statement is based upon obvious interpretations of the Municipal Code, pertaining to vaulted sidewalk space.

In Chapter 34, Section 47 of said Code, liability for damages is placed upon the owner or person in possession of the property upon which the sidewalk abuts. The language of said provision does not address itself to the person applying for the permit for use of said vaulted space.

Since the Code places liability upon the owner and person in possession of the land, it is obvious that the liability for said vault space runs with the land and does not terminate upon the permit holder conveying the premises.

The fact that this vault has been sealed and no longer utilized does not absolve the owner from responsibility for maintenance and repairs of said sidewalk.

Under Chapter 34, Section 41, of the Municipal Code, the land owner's relief of responsibility toward said sidewalk ends only when the sidewalk is closed in a condition similar to the balance of the sidewalk in front of said premises and said work is done to the satisfaction of the Commissioner of Public Works.

Since neither of these above two conditions were met, the owner of said premises is still responsible for the maintenance and repair of said sidewalk, and the fact that the vault was sealed and not utilized is irrelevant.

MAINTENANCE OF VAULTED SIDEWALK

(Shaps-Rent-A-Car, Inc.—M. L. P.—March 12, 1969)

Please be advised that the Department of Streets and Sanitation, Bureau of Streets, has forwarded to our office for immediate action your failure to correct the hazardous condition of a caved-in sidewalk adjacent to your property at 2051 West Madison.

Section 34-45 of the Municipal Code of Chicago provides that it is the property owner's responsibility to maintain a vaulted sidewalk in a good and safe condition.

You are obligated to restore the sidewalk to a good condition and you must first obtain a permit and inspection by the Department of Streets and Sanitation and employ a licensed contractor.

Failure on your part to restore the sidewalk will leave the City no alternative but to do the work and sue you for the cost. Also under the code, the City would be entitled to a punitive fine for your failure to do so. Further, since the condition of the sidewalk was caused by the vault under the sidewalk, if the City should be obligated to defend any action brought by person injured because of the hazardous condition, the City will have an action over against you for this responsibility.

Please advise the undersigned within ten (10) days what your intentions are.

CARRYING OF TRUCKS AS CARGO

(Director, Planning Division, Department of Police—R. N. K.—June 23, 1970)

Your recent letter addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for response. You request an opinion as to whether a fourth vehicle may be carried as cargo on a dual saddlemount method of trucks in transit.

Chapter 95½, Paragraph 224 (c) of the Illinois Revised Statutes of 1969 provides, in part, that a truck in transit may draw 2 trucks in transit coupled together by the dual saddlemount method.

If a fourth vehicle were carried in such a manner so that its wheels were not touching the ground the vehicle would not be considered "drawn" as provided in paragraph 224 (c). Instead, the fourth vehicle would be considered cargo.

Therefore, a fourth vehicle may be carried as cargo on a dual saddlemount method of trucks in transit provided the vehicles concerned are otherwise in compliance with the law of this State.

Section C. ADVERTISING AND HANDBILLS

ADVERTISING FROM AIRCRAFT

(City Attorney, City of Ann Arbor, Michigan—R. L. H.—September 13, 1972)

Your letter of September 8, 1972 addressed to the Corporation Counsel has been assigned to the undersigned for reply.

The Chicago ordinances regulating advertising from aircraft appears in Chapter 36 Use of Public Ways and Places in the Municipal Code of Chicago and states as follows:

36-28.1 No person shall operate any type of aircraft over the city while towing any advertising display or other object.

36-28.2 No person while operating any type of aircraft over the city shall cause to be dropped therefrom, any object, including circulars, posters, handbills, or other advertising matter.

36-28.3 No person while operating any type of aircraft over the city shall use, cause, permit or allow to be used any sound amplifier or similar mechanical device for the purpose of advertising goods, wares or merchandise.

The penalty provision appears in Section 36-50 and refers to a blanket penalty for violation of any provision of Chapter 36 where no specific penalty is otherwise provided in the amount of a fine not to exceed fifty dollars.

The ordinance has been enforced since its enactment (1949 for the first two provisions and 1951 for the third) strictly on a word of mouth basis. Where prohibited flights were contemplated and we became aware of them, a letter advising of the ordinance with a threat of prosecution has cancelled the flights. Where prohibited Flights were made prior to our having knowledge, a letter demanding their discontinuance threatening prosecution has terminated them.

As to the legality of our ordinance, sufficient to say that until a court of competent jurisdiction holds them either illegal, unenforceable or unconstitutional, the ordinances are considered valid and legal. It is important to note, however, that the principle of federal preemption of the navigable air space may affect the validity of the ordinances if they limit flight in the said navigable air space.

We are sure that you are aware that flights of the type in question here require a waiver and approval from the FAA since the flights, to be effective, must be at altitudes much lower than the ordinary prescribed minimums. We have full cooperation with the Great Lakes Regional Office of the FAA in this regard insofar as they are imposing restrictions on any waivers issued for such flights which set a high enough minimum altitude to make the flights unfeasable.

ADVERTISING ON BUSES AND TAXICABS

(Ratcliffe Advertising Agency—W. J. K.—June 10, 1971)

Replying to your letter wherein you request "a copy or summary of any regulations . . . pertaining to the use of advertising on exteriors of buses and taxicabs as well as . . . outdoor posters . . . advertising structures.", enclosed are xeroxed copies of the ordinances relating to outdoor posters and advertising structures.

As to the use of advertising on the exterior of taxicabs, please be advised that Section 28.3 of the Municipal Code of Chicago specifically prohibits the use of any advertising to be painted or carried on the outside of any taxicabs.

The Chicago Transit Authority, being a separate corporate entity, has sole authority as to any and all types of advertising on the exterior of its buses. It is suggested you contact said authority, whose address is,

Chicago Transit Authority
Merchandise Mart Plaza
Chicago, Illinois 60654

Trusting that the enclosures and the information submitted herewith are satisfactory.

ADVERTISEMENTS ON STRUCTURES OVER THE PUBLIC WAY

(Commissioner, Department of Streets and Sanitation—M. M. M.—April 24, 1969)

We are in receipt of your letter of March 26, 1969 regarding the captioned matter. Pursuant to your request, we have scrutinized the proposed revision of Section 9-112 of the Illinois Highway Code which was submitted to you by Mr. C. H. McLean, Assistant District Engineer of Operations, State of Illinois Division of Highways.

It is our opinion that the suggested amendments would cure the constitutional defect which the Illinois Supreme Court found insuperable in *City of Chicago* v. *Pennsylvania Railroad Company*, 41 Ill. 2d 245 (decided September 24, 1968). However, we believe that certain additions should be made to the proposed amendments in order to make this Section more susceptible to enforcement by municipalities.

On April 11, 1969 we prepared a letter in response to your communication of March 26, 1969 in which we set forth the aforesaid additions to the proposed amendments to Section 9-112 of the Illinois Highway Code. Our letter was held in abeyance awaiting a reply from Mr. McLean as to whether the amendments to Section 9-112 had been filed, in bill form, in Springfield. As of April, 1969 no bill has been filed which proposes to amend Section 9-112 of the Illinois Highway Code. Unless such a bill is filed by April 25, 1969, the Illinois Legislature would be powerless to consider such an amendment during this Session.

In response to your inquiry as contained in the third paragraph of your letter of March 26, 1969, there is no way, except by violating due process of law, by which Section 36-30 of the Municipal Code of Chicago could be amended to permit the City to 'summarily' remove advertisements appearing on structures over the public way. Section 36-30, however, could be amended so that the City could proceed in our Circuit Court, by way of an injunction, against public and private corporations for the purpose of removing commercial advertisements on their structures over the public way. It should be noted that Section 9-112 of the Highway Code, under the proposed amendment, would also achieve the above mentioned results.

Preliminary to any amendment of Section 36-30 by the Law Department, it would be necessary for your Department to secure approval from the Administration concerning this action. It would also be necessary for your Department to make a factual presentation justifying the amendment of Section 36-30.

Kindly advise whether Administration approval has been received regarding the amendment of Section 36-30 and also whether a factual presentation is readily available.

ADVERTISING ON RAILROAD VIADUCTS

(Acting Commissioner, Department of Sreets and Sanitation—M. M. M. —September 27, 1968)

Enclosed find Opinion of the Supreme Court of the State of Illinois in the case of City of Chicago v. Pennsylvania Railroad, et al., issued on September 24, 1968. This is the culmination of a lawsuit which was instituted at your request to compel the removal of advertising on railroad viaducts over City streets.

Please be advised that the Supreme Court has, on technical grounds, denied the relief sought in the City's Complaint. The decision does state that the City has the power to enact an ordinance which would prohibit the posting of advertising on railroad viaducts but has not done so at this time. We therefore, would suggest that if you desire that advertisements be prohibited on these structures, you prepare a presentation of the reasons in support of your contention that such advertising is dangerous to the public and is undesirable. I would suggest that you advise the State and County Highway Departments of this adverse ruling since it effects them more than it does us.

COMPENSATION FOR REMOVAL OF ADVERTISING PROJECTING INTO PUBLIC WAY

(Alderman Brandt—E. L. N.—March 31, 1969)

The query has been posed as to whether or not the City of Chicago is obligated under the law to make any compensation to those parties who have been asked by the Department of Buildings to temporarily remove their advertising signs which project out over into the public way, where such projection has become an obstruction which interferes with the construction of a public project extending Rapid Transit facilities.

While it is true that Article 2 of the Illinois Constitution requires that private property shall not be taken or damaged for public use without the payment of just compensation, it is also true that no one has a constitutionally protected right of property in connection with the use of the public way for business purposes. (See Opinions of the Corporation Counsel, Vol. 24 P. 501 at 502; Opinion No. 12346, issued June 23, 1963.)

The Supreme Court of Illinois has indicated in the case of the *City of Decatur vs. Chastine,* 19 Ill. 2nd 204 that there is no inherent right to use the highways for business purposes, and, that while it is the privilege of every citizen to use his property according to his own will, so long as such use does not interfere with the public interest, where one seeks special or extraordinary use of the streets or public highways, the use thereof, if any is allowed, may clearly be regulated by the authority permitting the privilege.

The Illinois Supreme Court has also specifically held in the case of *The People ex rel. Herman Armanetti, Inc., Appellee, vs. The City of Chicago,* 415 Ill. 2d 165 at 169 (1953), that where

> "Appellee seeks to utilize the space above a public way, a forbidden domain, to carry out its own private enterprise solely for its own financial profit . . . It has no inherent right to operate its business in or upon the streets of the City and its right to erect and maintain a projecting sign over the public way is permissive only, and may be withdrawn at anytime."

In light of all of the foregoing, it would be the opinion of this office that property owners having signs projecting over the public way, are lawfully allowed

to maintain said signs only with the permission and at the pleasure of the City; and that they therefore have no right to compensation for any inconvenience suffered or any costs incurred when asked to remove said signs, especially where, should the signs not be temporarily removed, said signs will interfere with the completion of a public improvement.

ORDINANCE PROHIBITING "SOLD BY" SIGNS

(Monroe Baptist Association of Rochester and Vicinity—C. J. O'B.—May 12, 1969)

Your letter to the Corporation Counsel has been referred to the undersigned for reply. In your letter you request information pertaining to our ordinance prohibiting "sold by" signs.

The Chicago Zoning Ordinance is a restrictive ordinance in that all uses are excluded unless expressly permitted. "For sale" signs are permitted in residential areas under paragraph 7.10-1(2) of Chapter 194A of the Municipal Code of the City of Chicago, which reads as follows:

"7.10-1 Permitted Signs—R1 Single-Family Residence District.

. . .

"(2) 'For Sale,' 'To Rent' Signs—subject to the following:

"a. there shall be not more than one such sign per lot except that on a corner lot two signs—one facing each street—shall be permitted. No sign shall exceed 12 square feet in area nor be closer than eight feet to any other zoning lot.

"b. Projection. No sign shall project more than two inches beyond the property line into the public way.

"c. Height. No sign shall project higher than one story or 20 feet above curb level—whichever is lower."

"Sold by" signs are not included in the ordinance and hence are not permitted. "Sold by" signs are deemed advertising signs for the benefit of the broker because the advantages of a "For Sale" sign to the owner terminates when the property is sold.

The foregoing ordinance applies to all areas of the City and was not drafted to attempt to stop "panic peddling." As you know there are two conflicting theories regarding the impact of "sold by" signs in racially changing areas. One view is that the "sold by" sign spreads panic in the neighborhood. The opposing view is that people in a changing area become extremely sensitive and aware of real estate transactions in the neighborhood and and will learn of the sale of property prior to the appearance of a "sold by" sign thereon, and that the sign induces anger and resentment rather than panic per se.

We are enclosing the booklet, *Your Civil Rights,* which sets forth the "panic peddling" provisions of the Chicago Fair Housing Ordinance on page 34, and the State Statute prohibiting "panic peddling" on page 37.

Section D. TRAFFIC AND PARKING REGULATIONS

REGULATION OF SPEED LIMITS NEAR O'HARE

(R. R. R.—J. E. S.—September 15, 1967)

Your correspondence addressed to Mr. James V. Fitzpatrick, Commissioner, Department of Streets and Sanitation, City of Chicago, has been referred to this department for answer.

As the matter is understood, question is raised concerning a posting of a 25-mile speed limit on the Terminal Entrance Road at Chicago-O'Hare International Airport by the Department of Streets and Sanitation rather than as outlined in Chapter 95½, Section 146.01, Ill. Rev. Stats. 1965.

It is submitted that the provisions of Section 146.01 apply on highways for which the Department of Public Works and Buildings of the State of Illinois has maintenance responsibility. Such a fact situation does not exist on the road in question. Further, it should be pointed out that the legal status of the road extending westerly from the west line of Old Mannheim Road, which was constructed solely from Airport Revenue Bond funds, is defined in Section 109 (c) and discussed in Section 124 of the Uniform Traffic Act, which latter section reads as follows:

> "Nothing in this Act shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner and not as matter of right from prohibiting such use, or from requiring other or different or additional conditions than those specified in this Act, or otherwise regulating such use as may seem best to such owner."

In light of the foregoing, it is suggested that the City of Chicago has the sole authority to adopt, post and enforce speed limits as here in question on the roadways situated on real estate not otherwise burdened, owned by the City of Chicago and situated within the perimeter of Chicago-O'Hare International Airport.

ABANDONED VEHICLES

(Alderman, 44th Ward— R. L. C.—July 28, 1967)

We have your letter of recent date stating in part "that the City should have an ordinance making it illegal to abandon vehicles on public thoroughfares. . . . (so that) a fine can be assessed against the owner of the car".

I believe that the type of vehicle which you have reference to is covered by Section 27-200 which defines an abandoned vehicle as:

> "A motor vehicle standing or parked on the public way, which vehicle is either (a) in such state of disrepair as to be incapable of being driven in its present condition, or (b) has not been moved or used for more than seven consecutive days and is apparently deserted."

The "nuisance" value and "eyesore" qualities which you seek to abate seem to be adequately covered by Section 27-372, which reads as follows:

> "It shall be unlawful for any person to abandon any motor vehicle on any public way within the city. Any motor vehicle standing or parked on any public way in such a state of disrepair as to be incapable of being driven in its present condition, or any motor vehicle which has not been moved for more than seven consecutive days and is apparently deserted shall be presumed to have been abandoned. Each day such vehicle remains so abandoned shall constitute a separate and distinct offense for which a separate penalty may be imposed."

The penalty provisions for abandoning a vehicle on the public way are found in Section 27-363, which provides for "a fine of not more than two hundred dollars for each offense".

The provisions for impounding abandoned vehicles, Section 27-423 et seq., direct the department to use all diligent methods, including inquiry of the Secretary of State, to ascertain the ownership. If these efforts are successful, I would

imagine that standard procedures would involve the issuance of a citation against the owner under authority of Section 27-372.

Inasmuch as the above sections of the Code seem to provide sufficient authority to support an aggressive campaign to eliminate the nuisance to which you refer, I will be happy to receive any further ideas or comments you may have on the subject.

SCHOOL BUS PARKING

(Project Director, Louise De Koven Bowen Center, Juvenile Protective Association—F. V. K.—December 24, 1968)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel of the City of Chicago, has been referred to the undersigned for response. You referred to two small school busses that had been parked by members of your staff overnight on a residential street for several months. On the night of September 10, 1968, both vehicles were ticketed for being parked on the residential street overnight. You request an opinion as to what arrangements can be made for parking the school busses in the neighborhood overnight and what to do about the tickets issued for parking violations.

The ordinance pertaining to the parking violation in question is section 27-319 of the Municipal Code of Chicago. The applicable portion of that ordinance reads as follows:

> "No person shall stand or park any . . . bus on any residential street for a longer period than is necessary for the reasonably expeditious loading or unloading of such vehicle . . ."

At this point it should be noted that a residential street for parking purposes as referred to above is defined in section 27-200 of the Municipal Code of Chicago. That section defines a residential street as:

> "The length of any street between street intersections when more than 50% of the occupied frontage of said street is in use for residence purposes."

Thus by examining the ordinance and the definition it can be seen that the parking of school busses is allowed overnight on any non residential street where overnight parking is otherwise allowed. Further, the busses can be parked off the street, on private property if such arrangements can be made. Therefore, the school busses can be parked in the neighborhood overnight but a place for them must be found that does not fit into the category of a residential street.

In reference to the two tickets issued on September 10, 1968, we suggest that you file an appearance on the date provided on the ticket. At the time of hearing, you can explain the situation to the Judge and he will then make the determination as to what should be done with them.

POSTING OF BUS STOP SIGNS

(Commissioner, Department of Streets and Sanitation—A. F. K.—June 20, 1968)

Please be advised that your recent letter to Raymond F. Simon, Corporation Counsel, inquiring about the proposed removal of Bus Stop signs, has been referred to the undersigned for reply.

In your letter you ask if the City is required to designate Bus Stops by the use of specific bus stop signs, or whether posting such places as "No Parking"

areas is sufficient to meet the requirements of the ordinances of the City of Chicago. This question is regulated by Section 27-412 of the Municipal Code of the City of Chicago:

"The commissioner of streets and sanitation, subject to the concurrence of the Chicago street traffic commission and to the approval of the city council, is hereby authorized and *required* to establish bus stops, bus stands, taxicab stands, and stands for other passenger common-carrier motor vehicles on such public streets in such places and in such number as he shall determine to be of the greatest benefit and convenience to the public, and every such bus stop, bus stand, taxicab stand or other stand *shall* be designated by *appropriate signs.*" (Emphasis Added)

Other ordinance sections bearing on the question are as following:

(1) "27-413. Authority to prohibit parking. The commissioner of streets and sanitation is authorized, * * * to determine and designate those streets or parts of streets upon which parking shall be prohibited * * * and he shall erect appropriate signs giving notice thereof."

(2) "27-414. Authority to regulate stopping, standing, or parking. The commissioner of streets and sanitation is hereby authorized, * * * to determine and designate those streets or parts of streets upon which stopping, standing, or parking shall be prohibited * * * and he shall erect and maintain appropriate signs giving notice thereof."

(3) "27-432. Parking signs required. The commissioner of streets and sanitation shall designate the locations of the provisions of subparagraphs * * * and (15) of section 27-311 by curb markings or by the erection of appropriate signs giving notice thereof."

(4) "27-311. Stopping, standing, or parking prohibited. It shall be unlawful for the operator of any vehicle to stop, stand or park such vehicle in any of the following places * * *

(15) Along the curb for a distance of a minimum of eighty-five feet at an official bus stop; * * * *"

(5) "27-326. Restricted use of bus and taxicab stands. No person shall stop, stand, or park a vehicle other than a bus in a bus stop, bus stand or bus terminal * * * such stop or stand has been officially designated by appropriate signs * * * *"

(6) "27-276. Stopping, standing, and parking of buses and taxicabs.

(a) The driver of a bus shall not stand or park such vehicle upon any street at any place other than at a designated bus stand or bus terminal.

(b) The driver of a bus shall not stop such vehicle upon any street at any place for the purpose of loading or unloading passengers other than at a designated bus stop, bus stand, passenger loading zone, or bus terminal except in case of an emergency.

(c) The driver of a bus shall enter a bus stop or passenger loading zone on a public street in such a manner that the bus when stopped to load or unload passengers shall be in a position with the right front wheel of such bus not further than eighteen inches from the curb and the bus approximately parallel to the curb so as not to unduly impede the movement of other vehicular traffic * * * *"

From the foregoing, it is apparent that:

a. The ordinance clearly distinguishes between parking and stopping or standing.

b. A prohibition against parking is not the equivalent of a prohibition against stopping or standing.

c. It is not only parking, but standing and stopping as well, which is forbidden in a bus stop.

d. Bus stops must be so designated by appropriate signs.

e. Bus drivers may not stop their vehicles to load or unload passengers except at designated bus stops.

It is, therefore, our opinion that a "No Parking" sign is inadequate and inappropriate marking for a bus stop, that it fails to apprise bus drivers and bus users of places for loading and unloading. In addition, it is not sufficient as prohibition against standing and stopping motor vehicles in a bus stop and, thus, fails to avert the impediment to vehicular traffic and the hazard to persons which is created when a bus loads and unloads passengers while further than eighteen (18) inches from the curb. It is our further opinion that the provisions of the ordinances, when read together, unmistakably require that bus stops be marked as bus stops.

REGULATORY TRAFFIC SYSTEM ON COLLEGE PROPERTY

(Commissioner, Department of Streets and Sanitation—G. F. H.—October 11, 1972)

It is the opinion of this office that the City can enter into an agreement with the proper authorities of the Olive-Harvey College Campus to install, maintain, and enforce a regulatory traffic system on college property.

The authority for such an agreement can be found in the intergovernmental cooperation section of the 1970 Illinois Constitution (Art. VII, par. 10), which permits contracts between local governmental units and school districts for sharing services or transferring powers in any manner not prohibited by law. We have found no law prohibiting such an agreement. On the other hand, an analogous system of contractual cooperation for the regulation of traffic in private parking areas can be found in Section 11-209 of the Motor Vehicle Code (Ill. Rev. Stat. ch. 95½, par. 11-209).

The system you propose can be implemented by way of an ordinance which empowers the Mayor to execute a contract containing substantially the terms set forth in the ordinance. If it is agreed that the City should also enforce the traffic system once it is established it would be advisable to include enforcement provisions, as well as any compensation provisions therefor, in the terms of the contract.

USE OF KING DRIVE BY COMMERCIAL VEHICLES

(Acting Commissioner, Department of Streets and Sanitation—S. R. D. —September 19, 1968)

We acknowledge receipt of your letter of September 6, 1968, in which you state that prior to the passage of the ordinance changing the names of South Park Avenue and South Parkway to Dr. Martin Luther King, Jr. Drive (C.J. 7/31/68, pp. 3438-3439), South Parkway from 26th Street to 60th Street was designated as a boulevard and commercial vehicles were prohibited while South Park Avenue, south of 60th Street, was not so designated and commercial vehicles were permitted to travel thereon. You request our opinion, now that South Park Avenue, south of 60th Street, is Dr. Martin Luther King, Jr. Drive and properly designated as such by the placing of street name signs, whether commercial vehicles are prohibited from traveling thereon.

Section 2 of the Ordinance changing the name of South Parkway and South Park Avenue to Dr. Martin Luther King, Jr. Drive provides as follows (C.J. 7/31/68, p. 3439):

> "The Commissioner of Streets and Sanitation is authorized and directed to place the proper signs bearing the name set forth in Section 1 along said street."

The Ordinance contains no provision regulating traffic or the type of vehicle which may use Dr. Martin Luther King, Jr. Drive south of 60th Street. The changing of the name of the street to Dr. Martin Luther King, Jr. Drive was accomplished under the authority of Section 11-80-19 of the Illinois Municipal Code (Ill. Rev. Stat. 1967, Ch. 24, par. 11-80-19). However, there is no provision in Section 11-80-19 pertaining to the regulation of traffic where the name of the street has been changed.

The City Council does have the power to regulate traffic and the use of the City streets. Section 11-80-2 (Ill. Rev. Stat. 1967, Ch. 24, par. 11-80-2) provides:

> "The corporate authorities of each municipality may regulate the use of the streets and other municipal property."

The mere changing of a street to "Drive" or "Boulevard" does not, however, automatically regulate the type of vehicles which may use such street. This can only be accomplished by the passage of an ordinance by the City Council.

We are of the opinion that in the absence of an ordinance that portion of "Dr. Martin Luther King, Jr. Drive" south of 60th Street is open to use by commercial vehicles.

FAIR LABOR STANDARDS ACT RE: CHICAGO PARKING FACILITIES

(Commissioner, Department of Streets and Sanitation—S. R. D.—July 27, 1969)

We acknowledge receipt of your recent communication requesting an opinion as to whether the operators of the City Parking Facilities and their employees are subject to the provisions of the Fair Labor Standards Act (29 U.S.C. 201, et seq.). You state that at the present time the operators and the union, of which the employees are members, have a contract which provides for time and one-half for overtime in excess of 54 hours per week. You further state that the Department of Labor, Wage and Hour Division, is of the opinion that the operators of certain of the City Parking Facilities and their employees are subject to the provisions of the Fair Labor Standards Act which provides for time and one-half, after February 1, 1969, for all hours in excess of 40 hours per week (Section 7, Fair Labor Standards Act, as amended 1966).

The City Parking Facilities are operated under contract between the City of Chicago and the operator of the individual parking facilities. The sole function of the operation is to provide "for off-street parking of motor vehicles" (Article X). Article XII of the contract provides in part that "at no time shall the operator accept or cause to be accepted for parking any commercial vehicles". Under the contract, the operator is paid a graduated fee and expense reimbursement (Article XIX).

The Fair Labor Standards Act of 1933, as amended, specifically exempts a state, or a political subdivision thereof, from the definition "employer" (Section 3(d)). Further, in order for a business to come within the provisions of the Act, it must be "engaged in commerce or the production of goods for commerce" (Section 3(s)). It would appear, that a municipally-owned parking facility, limited to the parking of passenger vehicles, would not be "engaged in commerce or in the production of goods for commerce" and, therefore, would not be subject to the provisions of the Fair Labor Standards Act. However, in a conference with an attorney for the United States Department of Labor, we were informed that certain operators of City Parking Facilities are either national in scope or have other privately-owned parking facilities where gasoline, oil, or automobile parts, which are imported from outside the State of Illinois, are sold. The operation of such a business by the operator of a municipally-owned parking facility might subject the operator and its employees to the provisions of the Fair Labor Standards Act.

Whether the operator and the employees of a certain municipally-owned parking facility are under the provisions of the Fair Labor Standards is a question to be determined, in the first instance, by the operator and the United States Department of Labor.

If it is determined that the operator and the employees of a particular City Parking Facility come under the provisions of the Fair Labor Standards Act, we are of the opinion that a determination of whether the overtime paid by the operator to its employees, under the provisions of the Act, is a reimbursable expense, under the provisions of the contract between the operator of the parking facility and the City, should remain in abeyance until the accounting provided for in Article XIX of the contract.

UNIFORMITY OF FINES LEVIED AGAINST PARKING VIOLATORS

(Court Administrator, Philadelphia, Pa.—H. L. R.—September 18, 1968)

Your letter to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response. You ask for information about the fines assessed against parking violators, whether the fines vary in accordance with the situs of the violations, and also whether private parking lot operators are restricted by the city as to the rates they may charge.

The fines levied against parking violators are uniform throughout the City of Chicago and do not vary from district to district. They do, however, vary according to the type of violation. For example, a $10.00 fine is levied for violations of signs prohibiting parking at certain times or for longer than the time designated, and a $3.00 fine is levied for violations of parking meter regulations. We have enclosed a copy of Traffic Regulations of the City of Chicago. We specifically call your attention to Sections 27-305 through 27-332 which relate to parking violations.

There are no restrictions placed upon private parking lot operators as to their rates. They are limited only by the competitive nature of their business.

PARKING METER COVER

(Commissioner, Department of Streets and Sanitation—F. G. S.—October 7, 1969)

Your letter addressed to Raymond F. Simon, Corporation Counsel, requesting an opinion as to whether or not a fee or charge may legally be made for meter covers providing for "no parking" restrictions during emergency measures, such as construction, funerals and street repairs, has been referred to the undersigned for reply.

A review of the Ordinance Authorizing City of Chicago Parking Facility Revenue Bonds indicates that the use of parking meters is for the purpose of providing parking by a maximum number of individuals during a given period and to produce revenue for the city in connection with the regulation thereof.

Section 5.01 of Article V of said Ordinance (C. J., Sept. 18, 1952, pp. 3156-57), provides, in part:

> "The city further covenants and agrees that so long as any of the bonds remain outstanding it will at all times establish, maintain and enforce on-street parking regulations relating to the use of parking meters . . . and that the city will collect parking fees in all streets of the city with respect

to which such regulations are in force and in which such meters are installed in accordance with the regulations, . . ."

Section 7.04 of Article VII of said Ordinance (C. J. Sept. 18, 1952, p. 3161), in part, states:

"All parking meters shall be maintained in good order and condition and the city will take every step permitted or required by law to effect collection of parking meter revenues."

The city ordinance cited makes no provision for the use of parking meter covers for "no parking" restrictions by private individuals whose business may necessitate such use. It is our opinion that providing of meter covers for "no parking" restrictions by our Bureau should be limited to actual specific emergency situations which benefit the City or its residents, or in instances where it is necessary to protect the health, safety or welfare of the general public. No fee or charge for use of parking meter covers under such circumstances, should be made.

OBSTRUCTION OF TRAFFIC

(A. M. S.—H. N. L.—June 19, 1972)

This letter is in reply to your letter of April 7, 1972 regarding the Uptown Certified Meat Market.

We regret to inform you that Section 27-312(b) of the Municipal Code of the City of Chicago would prohibit anyone from parking in the alley behind your client's meat market if that would result in less than ten feet being left for other vehicular traffic.

The relevant code provision states "No person shall stop, stand, or park a vehicle within an alley in such a manner or under such conditions as to leave available less than ten feet of the width of the roadway for the free movement of vehicular traffic."

In light of the clear wording of the ordinance we could not interpret it in such a way so that your client's meat purveyor would be exempt from it.

We suggest that you make an application to the Commissioner of Streets and Sanitation for a freight Curb loading zone. We refer you to sections 27-410 and 27-411 of the Municipal Code for curb loading zone regulations.

You also would, of course, have to comply with all other building zoning code requirements. Your letter does not indicate the area of your establishment, however it may fall under sections 8.10-5 and 8.10-1 of the Chicago Zoning Ordinance (Municipal Code §194A) regarding off street loading provisions.

WHEN IS A CAR "PARKED"

(J. N.—H. F. W.—September 10, 1970)

We wish to acknowledge receipt of your letter of August 21, 1970 addressed to the Honorable Richard J. Daley, in which you request a clarification of the parking ordinances of the City of Chicago.

For your convenience, we are enclosing a copy of the Traffic Regulations of the City of Chicago.

In your letter you request a clarification of "when can a car be considered to be parked". On Page 5 of the enclosed ordinances, parking is defined to be, "The standing of a vehicle whether occupied or not, upon a roadway, for a period of time greater than is reasonably necessary either for loading or unloading. . . ."

In your letter you also request information pertaining to "No Parking" signs. The City Regulations pertaining to parking are covered by Sections 27-305 through 27-318 on Pages 41 through 47 of the enclosed Traffic Regulations.

LICENSING OF PARKING LOTS

(Alderman, 9th Ward—H. L. R.—December 5, 1967)

Your letter of November 17, 1967, addressed to Mr. Raymond F. Simon, has been referred to the undersigned for response. In your letter, you ask whether section 156-13 of the Municipal Code of Chicago, applies to coin-gate operated parking lots.

Your letter does not describe the type of lot which is of concern to you. Section 156-13 of the Municipal Code of Chicago specifically excludes certain parking lots from the requirement of a license, including lots provided for customers and employees by places of business and also lots provided by owners of apartment buildings who are required to do so by off-street parking regulations.

If the type of lot that you are interested in is not in one of the above-mentioned categories, it is already covered by section 156-13 of the Municipal Code. This type of lot would appear to be a class II lot under section 156-17 of the Municipal Code. These are, typically, parking lots which are utilized by transient car owners who pay a daily, weekly, or monthly fee for parking. The fee may be fed directly into the coin box, or, as is often the case in weekly and monthly use of a lot, a key or card is utilized to operate the entrance gate. This type of parking lot may be considered a "public garage" and therefore regulated by the City of Chicago under section 156-13 of the Municipal Code.

POSTING OF RATES IN PARKING LOTS

(J. N. D.—A. F. K.—September 25, 1968)

Your recent inquiry to the Corporation Counsel of the City of Chicago, has been referred to the undersigned for reply.

In your letter you ask "whether the City of Chicago has an ordinance requiring public parking lots to post their rates?" Your letter goes on to request the citations for the applicable ordinance provisions and recitation of their contents.

Please be advised that the Municipal Code of the City of Chicago provides, with respect to public garages, in parts pertinent to your inquiry as follows:

Chapter 156, Section 17:

* * *

"Class II. This class shall include all public garages not enclosed within a building having four walls and a roof extending from wall to wall and covering the entire space enclosed by such walls."

Chapter 156, Section 17.1:

* * *

"Whenever the capacity of Class II garage has been reached, the owner or operator thereof shall immediately post a notice in a conspicuous place on the entry side of the garage where it will be clearly visible to drivers of motor vehicles in the abutting street, indicating that no more space is available in the garage. He shall also post and maintain permanently a sign, *similarly visible,* indicating the charges for parking therein." (Emphasis added.)

PARKING LOTS AND TRAFFIC CONGESTION

(Commissioner, Department of Streets and Sanitation—P. M. S.—January 29, 1970)

We are in receipt of your letter of January 20, 1970 in which you request clarification of your responsibility under that part of Sec. 156-17.1 of the Municipal Code of Chicago which states:

> "In all Class II garages the location of service buildings on a premises shall meet the requirements of this code and have the approval of the Commissioner of Streets and Electricity."

This ordinance was passed by the City Council on June 14, 1950. Among other ordinances passed at that time was Sec. 50-3.2.(b) which states as follows:

> "Buildings on Parking Lots. Buildings on parking lots, for office or service purposes shall be in conformity with the applicable provisions of the building code for buildings of such class. No part of the ground area of such building shall be nearer to the front street line than a distance, determined by the commissioner of streets and electricity, after a traffic engineering survey, to be adequate to prevent traffic congestion on the abutting street."

These two ordinances were enacted prior to the amendment of November 10, 1952 wherein the name of the Department of Streets and Electricity was changed to the Department of Streets and Sanitation.

It is our opinion that the purpose of these two ordinances was to prevent the operators of parking lots from locating the service building so near the street that cars will necessarily have to wait on the street itself to get checked into the parking lot. If the service building were located further back in the lot, these cars could do this waiting in the parking lot's driveway.

It is, therefore, our opinion that your Department's responsibility under Section 156-17.1 and Section 50-3.2.(b) of the Municipal Code of Chicago is to conduct a traffic engineering survey to determine the distance the service building must be set back from the front street line in order to prevent congestion on abutting street.

PARKING VIOLATION IN PRIVATE LOT

(J. H. H.—H. Z.—April 7, 1972)

Your letter addressed to Mr. Richard L. Curry, Corporation Counsel of the City of Chicago, concerning parking violators in a Shopping Center Parking Lot, has been referred to the undersigned for reply.

The Municipal Code of Chicago, Chapter 27 entitled Traffic, Section 27-381 —states:

> "It shall also be unlawful for any person not so entitled to park a vehicle in a private parking lot, established voluntarily or pursuant to the Chicago Zoning Ordinance, to provide off-street parking facilities for tenants or employees of the owner."

and Section 27-365 (a) paragraph 2 states:

> "When any vehicle is parked in a private parking lot in violation of Section 27-381 (a) and there is no person in attendance upon such parked vehicle to be arrested or served immediately with a traffic violation notice to appear in court to answer the charge of such violation, any police officer upon a written complaint signed by the owner or proprietor of the lot, or by his

authorized agent, that the vehicle is not entitled to the privileges of the parking lot may attach to the vehicle a traffic violation notice as provided herein."

The Municipal Code of Chicago, Chapter 156, Section 156-13 defines a public garage as follows:

"156-13. The term "public garage" as used in this chapter is hereby defined as meaning any building, structure, premises, enclosure, or other place, except a public way, within the city, where two or more motor vehicles are stored, housed, or parked for hire, in a condition ready for use, or where rent or compensation is paid to the owner, manager or lessee of the premises for the housing, storing, sheltering, keeping, or maintaining of such motor vehicles. Provided, that nothing in this section shall be construed as applying to off-street parking of passenger vehicles with seating capacity of not more than seven passengers on vacant property maintained for the accommodation of patrons or employees of business establishments or occupants of residential units, where such parking is permitted without supervision by paid attendants. [Amend. Coun. J. 12-15-43, p. 984; 1-30-52, p. 1909.]"

The Shopping Center parking lot is not a public garage within the meaning of this Section and therefore does not need to be licensed to accommodate the vehicles of its patrons.

In accordance with the aforesaid provisions, it is the opinion of this office that the Police Department of the City of Chicago may issue a traffic violation notice for any vehicle illegally parked in such a Shopping Center parking lot upon a written complaint signed by the owner of the lot or his authorized agent.

APPLICABILITY OF PARKING TAX TO STATE-OWNED VEHICLES

(Acting Director, Department of Revenue, State of Illinois—G. F. H.—March 22, 1973)

In response to your inquiry as to the applicability of the Chicago Parking Tax to parking transactions involving State-owned vehicles used only for official State purposes, it is the opinion of this office that the Chicago Parking Tax Ordinance, as it is presently in force, does not apply to transactions such as you describe.

Assuming that the State-owned vehicles covered by the State's contract with System Auto Parks & Garages, Incorporated, are readily identifiable and demonstrable evidence of past payment of the tax is available, presentation of such evidence to the Office of the City Collector would be the initial step to be taken in order to secure a refund for any past payment of the tax.

JACOBS v. CHICAGO—HOME RULE TAXING POWER

(City Council—G. F. H.—January 30, 1973)

On January 26, 1973, the Illinois Supreme Court rendered an opinion affirming in part and reversing in part the decision of the Circuit Court of Cook County which had upheld the constitutionality of the Chicago Parking Tax Ordinance in general (Chapter 156.1, Municipal Code of Chicago) but had held invalid the exemption of certain residential parking contained in section 1-1 and 1-2(c) of the ordinance.

Three cases, all challenging the validity of this new tax, were consolidated for purposes of trial. All three sets of plaintiffs appealed from the decision of the trial court. The City of Chicago cross-appealed from that portion of the decision which held the residential parking exemption invalid.

The Illinois Supreme Court held that the City of Chicago, as a home-rule unit under the 1970 Illinois Constitution, has the power to levy this type of privilege or use tax. Although plaintiffs urged various reasons why the parking tax ordinance should be declared unconstitutional in its entirety, the Court found no merit to any of these contentions. The Court also found that the exemption for residential parking was a reasonable classification and that the trial court erred when it held the exemption invalid.

PARKING TAX—EXEMPTIONS

(Thirty-four Forty Lake Shore Drive Garage—G. F. H.—February 9, 1973)

The recent newspaper article to which you refer apparently was reporting the January 26th decision of the Illinois Supreme Court upholding the validity of the Chicago Parking Tax Ordinance (Chapter 156.1 of the Municipal Code of Chicago).

The Parking Tax Ordinance imposes a tax on all parking *except* residential off-street parking by house or apartment tenants when the arrangement for such tenant parking is provided in the house or apartment lease or in a separate writing between the landlord and tenant.

Under the terms of this Ordinance, tenants in your building can qualify for the exemption, but it is not available to those persons who park in your building but who are not tenants there. It is also not available to occasional guests who use your parking facilities.

PARKING TAX AND CONDOMINIUM GARAGE

(A. M. J.—W. R. Q.—March 8, 1972)

It is the opinion of this office that the Chicago parking tax does not apply to and is not required to be paid by the owners of the condominium units who park their vehicles in your garage, since such residential parking arrangements are expressly excepted by Section 156.1-1 of the parking tax ordinance.

However, the tax is applicable to and must be paid by guests who rent space in the garage while visting owners as well as by all other non-owners, non-residents, and transients who rent parking space whether on an hourly, daily, or monthly basis. It is also applicable to and must be paid by service, repair and maintenance people, if such persons are charged a rental for the space occupied by their vehicles while they are in the building to service individual units.

The parking tax, by definition in the ordinance, does not apply to any parker whose vehicle is occupying rent-free space.

RIGHT TURN ON RED LIGHT

(Commissioner, Department of Streets and Sanitation—A. H.—May 6, 1969)

We have your recent letter seeking to be advised with respect to whether signs reading, "Right Turn Permitted On Red After Stop," can be posted under the Illinois Uniform Act Regulating Traffic on Highways and the present Municipal Traffic Code of Chicago.

With respect to the State traffic code provisions, Section 32(c) 1. of the Uniform Act Regulating Traffic (Ill. Rev. Stat. 1967, ch. 95½, par. 129(c) 1.) provides as follows:

> "(c) Steady red (alone).
>
> 1. Vehicular traffic facing the signal must stop before entering the nearest crosswalk at an intersection or at such other point as may be indicated by a clearly visible line or if none, before entering the intersection, and shall remain standing until the green indication is shown unless *otherwise directed by a sign or lighted green arrow.*" (Emphasis supplied.)

It is our opinion that the underscored language of the foregoing provision contains the authority for your proposed "right turn permitted on red after stop" provision.

It is also the opinion of this Department that Chapter 27, Section 27-202(e) (1) of the Municipal Code of Chicago as presently worded specifically prohibits vehicular traffic facing a red signal from proceeding into an intersection until such time as a green or "go" indication is displayed. In order to authorize the proposed "right turn permitted on red after stop," an ordinance amendment to the Municipal Code provision aforesaid would be necessary. A proposed ordinance amendment embodying such a change has been prepared and is herewith attached for your consideration.

JURISDICTION TO DECREASE SPEED LIMIT

(Committee on Traffic and Public Safety—H. N. L.—May 26, 1972)

Thank you for your letter of March 23, 1972, in which you requested an opinion as to whether or not the City of Chicago has the jurisdiction to decrease the speed limits on residential streets from 30 miles per hour to 25 miles per hour.

The City has the power to make this change in speed limits. This authority can be found in Section 11-604 of the Illinois Vehicle Code (Ill. Rev. Stat. 1971, ch. 95½, par. 11-604). It spells out the proper steps to be followed in changing speed limits. Section 11-604 states:

> "[a]ny park district, city, village, or incorporated town may establish absolute maximum speed limits on all streets which are within its corporate limits and which are not under the jurisdiction of the Department or of such Commission, . . ."

The section then goes on to say that local authorities are authorized to establish speed limits that are reasonable and safe, on the basis of engineering or traffic investigations. The passage of ordinances by local authorities which decrease the limits within urban districts are allowed, but not to less than 20 miles per hour. Therefore, it seems quite apparent that the statute specifically allows local control of the speed limits within a municipality's jurisdiction, and allows the lowering of limits, as long as they are not decreased to less than 20 miles per hour.

The only qualifications the statute sets out for the local authority to meet are

1. That the streets not be under the control of the Department of Highways or Illinois State Toll Highway Commission;

2. That there must be an engineering or traffic investigation to determine the need to decrease the speed limits, (but it doesn't spell out the extent of the investigation required);

3. That the change of the speed limits must be done by passage of an ordinance;

4. That the change will not become effective until appropriate signs giving notice of the change are posted along the area or areas to be affected; and

5. That the local authority must forward a copy of the proposed ordinance along with the data collected in its investigation to the Department of Highways for it's approval.

Thus, we have the power to change speed limits if we adhere to the requirements of Section 11-604 that were set forth above.

PROGRESSIVE SPEED SETTING

(Commissioner, Dept. of Streets and Sanitation—B. M. K.—August 2, 1971)

The City of Chicago's Department of Streets and Sanitation, Bureau of Street traffic, has designed traffic signals to operate on a 65-second cycle for nearly all preferential streets. With signals spaced at one-quarter of one-half mile intervals, this results in a progressive speed setting of 27.7 miles per hour. The Commissioner of Streets and Sanitation, pursuant to Secttion 27-400 of the City of Chicago Municipal Code, has the authority to regulate the timing of traffic signals so as to permit the flow of traffic to run smoothly and safely.

> 27-400. The Commissioner of Streets and Sanitation is authorized to regulate the timing of traffic signals so as to permit the movement of traffic in an orderly and safe manner.

The traffic signals on Pratt are timed to accord the safest flow of traffic east and west on Pratt as well as north and south on California and Western Avenues, two main arteries which intersect Pratt and provide a greater and more rapid flow of traffic than does Pratt. The fact that the speed limit on Pratt is 25 miles per hour and the traffic lights are fixed at 27.7 miles per hour, only a 2.7 miles per hour difference is of no real significance as: traffic rarely moves at exactly the prescribed speed limit because of vehicles which exceed the speed limit (possibly because of inaccurate automobile speedometers) and a large amount of traffic travels at less than 25 miles per hour because of the children who play in this area, and to coordinate these lights differently would adversely affect the flow of traffic on Western and California Avenues where the speed limit is 30-miles per hour, as well as on Pratt east of Western Avenue where the street narrows considerably and the traffic moves at a much slower rate of speed.

Section 27-212 of the City of Chicago Municipal Code and Section 95½—11-601 of the Illinois Revised Statutes provide the Commissioner of Streets and Sanitation with broad discretion as to setting minimal and maximum speed limits.

> 27-212. The provisions of Article VI of the "Uniform Act Regulating Traffic on Highways" shall be applicable on all streets within and under the jurisdiction of the city. The absolute statutory urban speed limit shall be 30 miles per hour in streets and 15 miles per hour in alleys. The absolute statutory non-urban speed limit shall be 65 miles per hour. Where the commissioner of streets and sanitation has determined on the basis of an engineering or traffic investigation that the said speed limits are greater or less than is reasonable or safe with respect to the conditions found to exist at any place or along any part or zone of any street or highway, but not of any alley, the said urban speed limits may be increased but not in excess of 65 miles per hour and may be diminished but not to less than 20 miles per hour and said non-urban speed limit may be diminished but not less than 35 miles per hour, when such determination is approved by an ordinance of the city council. Such ordinance altering said speed limits shall be enforceable when appropriate signs giving notice of the limits are erected at the proper places along the proper part or zone of the street or highway.

In his discretion the Commissioner of Streets and Sanitation of the City of Chicago has determined that the speed limits and traffic signal control in the area on Pratt between California on the west and Western on the east, provide this community with safe and efficient traffic control.

No instance of tort recovery based on discretionary timing of stop and go lights has been experienced by the City of Chicago.

The problem of safety of children is far more a question of speed limits rather than signal timing.

The City of Chicago is not placed in jeopardy by the timing of stop and go lights on Pratt Avenue.

PROPER POSITION OF STREET CLEANING SIGNS

(Commissioner, Dept. of Streets and Sanitation—A. H.—June 14, 1968)

Your letter of June 5, 1968, requesting a legal opinion pertaining to the proper position of street cleaning signs, addressed to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for consideration and response.

You state that a residential street cleaning program involving permanent signs is being considered under which signs would be affixed to street light standards ". . . located on one side of the street," and that said signs ". . . would indicate the time and a specific day of the week for each side of the street." You ask for our opinion insofar as Section 27-207 of hte Municipal Code of Chicago pertains to the proper position of said signs.

Under Section 25 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1967, ch. 95½, par. 122), the provisions of said Act are made applicable and uniform throughout the State and in all political subdivisions and municipalities. Local authorities are permitted under this section to adopt additional traffic regulations not in conflict with the provisions of the Act. The section also provides that said local regulations . . . shall not be effective until signs giving notice thereof are posted upon or at the entrances to the highway *or part thereof affected* as may be most appropriate." (Emphasis supplied.)

Section 26 of the Act (Ill. Rev. Stat. 1967, ch. 95½, par. 123) sets forth certain powers of local authorities which may be exercised within their jurisdiction. Under subsection (a)(1) thereof, local authorities may regulate the standing or parking of vehicles. Under subsection (b) thereof is found language which states that an ordinance or regulation adopted pursuant to the provisions above referred to shall be effective ". . . until signs giving notice of such local traffic regulations are posted upon or at the . . . *part thereof affected* as may be most appropriate." (Emphasis supplied.)

We turn now to the ordinance provisions bearing upon the question. The Municipal Code of Chicago, Chapter 27, Section 27-207, provides that no traffic ordinance may be enforced against an alleged violator if at the time of the alleged violation ". . . an official sign *is not in proper position* . . . to be seen by an ordinary observant person." (Emphasis supplied.) Section 27-308(b) of the Code refers specifically to street cleaning signs, authorizing the Commissioner of Streets and Sanitation ". . . to erect *temporary* signs designating the days of the week and hours of the day and the part of the street in which the parking of vehicles is prohibited during the periods and at the location designated on the said signs. . . ." (Emphasis supplied.)

From the foregoing statutory and ordinance provisions, it is our opinion that the placement of a regulatory sign such as you propose on one side of the street, purporting also to regulate parking on the opposite side, is in conflict with

the Uniform Act Regulating Traffic provisions and ordinance provisions hereinabove set forth, particularly, the language underscored therein. Said signs would not be placed on the part of the street affected, insofar as the sides of the street opposite to the signs are concerned. Further, no authority has been delegated to the Department of Streets and Sanitation to erect permanent signs relating to street cleaning. Should permanent signs be desirable, we suggest that this could be done through the adoption of an ordinance or through the amendment of the existing ordinance referring to temporary signs.

TOWING OF STREET CLEANING PARKING VIOLATORS

(46th Ward Alderman—R. F. F.—May 11, 1972)

This is in response to your inquiry whether it is legal for the City to tow cars if they are parked in violation of signs stating "No Parking-Street Cleaning Today."

Section 27-360 of the Municipal Code of the City of Chicago states that "Members of the police department of this city are hereby authorized to remove a vehicle from any public way to the nearest city vehicle pound or authorized garage as determined and designated by the commissioner of police under the circumstances hereinafter enumerated . . . (8) When any vehicle is parked in violation of official signs indicating that parking, standing or stopping is prohibited for a longer time than indicated on such sign."

Thus, autos parked in violation of street cleaning signs may be towed to the City Pound.

Section 27-361 of the Municipal Code allows autos to be towed "to any other location," but only under emergency conditions. Since violations of street cleaning regulations are not emergencies, under the present ordinance, cars violating street cleaning parking regulations may only be towed to a city pound and or authorized garages, pursuant to section 27-360.

Similarly, section 4-202(d) of the Illinois Vehicle Code (Ill. Rev. Stat. 1971 ch. 95½, par. 4-202) authorizes the towing of such vehicles and does not restrict the place where they may be towed. That section states:

> "When an . . . unattended . . . motor vehicle . . . is creating a traffic hazard because of its position in relation to the highway [public road] . . . its immediate removal . . . by a towing service may be authorized by a law enforcement agency having jurisdiction."

This section, also, limits towing to those situations where the unattended car presents a danger. Since automobiles parked in violation of street cleaning regulations create an inconvenience, but no substantial hazard, the police are not authorized to tow other than to the City pound.

ILLINOIS TARIFF RATE FOR DAILY TRUCK RENTAL

(Commissioner of Public Works—R. L. H.—May 3, 1971)

Your letter and attachments of April 30, 1971, requests our opinion on the matter of the new schedule of rates and the effective date for these new rates.

We have researched the statutes, the rules, regulations and general orders of the Illinois Commerce Commission, discussed the matter with Mr. Robert

Gmelich of the Commission in Springfield, and have reviewed our files on previous years action. As a result thereof, we find as follows:

1. All that is legally required for an increase in rates is the filing of a tariff with the Commission at least 30 days prior to the effective date—no notification by any means is required to be given to the City.

2. Notification from the agent for the Tariff Bureau that an increase in rates was to be filed has always been submitted to the City prior to filing—except this year.

3. In previous years, the City voiced its technical objections to the proposed increases by letter to the Commission. The response of the Commission always indicated that our objection had been noted, the increases were proper, however, and the objections denied.

4. The letter objection to an increased tariff effective January 1, 1969, was denied by the Commission in a communication advising that the objections were not even considered since they were not proposed by petition pursuant to rules, regulations and general orders of the Commission.

5. Notification of a proposd increased tariff effective January 1, 1970, was received in November 1969, and pursuant to a communication from your office, a petition was timely filed with the Commission objecting to the increases. The net result of our action was a seven-month suspension of the increase by the Commission and, during said period of suspension, the Tariff Bureau withdrew the proposed increased tariff. As a direct result thereof, the City was paying 1969 rates for daily truck hire throughout calendar 1970.

6. Notification of the increased tariff effective February 1, 1971, was not received until after said effective date such that objections thereto could not be made.

Pursuant to the foregoing, please be advised that the increased rates as set forth in the tariffs attached to your letter as issued by the Northern Illinois Tariff Bureau became legally effective on February 1, 1971, and the City is legally bound to pay these rates from that date on until a new tariff is filed with the Commission. In the event you believe the rates therein set forth are too high, it is too late to enter an objection, the last date for so doing having been January 12, 1971.

Since we were not advised of the increased tariffs until it was too late to timely object thereto, we are requesting the Commission and the Northern Illinois Tariff Bureau, as a courtesy, to advise us of any future filings related to these tariffs for truck hire, a copy of said letter being hereto attached.

CHAPTER X—FINANCE

Section A. APPROPRIATIONS AND TAXES

APPROPRIATION FOR ELECTION OF MEMBERS OF THE BOARD OF EDUCATION

(Budget Director—S. R. D.—August 11, 1970)

We acknowledge receipt of your recent communication requesting our opinion as to whether, under the provisions of Senate Bill No. 1395, the City of Chicago or the Board of Education should pay the cost of the Special Election to be held on June 8, 1971.

Senate Bill No. 1395, approved on July 10, 1970, amends Sections 34-3 and 34-4 of the School Code (Ill. Rev. Stat., 1969, Chap. 122, Art. 34) and adds Sections 34-3.1, 34-3-2, 34-3.3 and 34-3.4.

Section 34-3.1 provides that the Board of Education, in municipalities of 500,000 population or more, shall consist of 15 members elected from 15 districts created as therein provided.

Section 34-3.3 provides that there shall be an election for members of the Board of Education on the 4th Tuesday of September, 1971, and every 4th year thereafter.

Section 34-3.4 provides that the elected members of the Board of Education shall serve for terms of 4 years commencing on the 1st Tuesday of December of the year elected and until their respective successors are elected and qualify. If a vacancy occurs "in the office of member of the Board of Education more than 1 year before the expiration of the term of office, the vacancy shall be filled for the remainder of the term by a special election called by the board."

The Act provides that the question of the adoption of the Amendatory Act of 1970 shall be submitted to the legal voters of the City of Chicago at a Special Election to be held on Tuesday, June 8, 1971; and that the Board of Election Commissioners of the City of Chicago shall hold such Special Election and submit the question of the adoption of an elected school board to the legal voters. It is also provided that the Amendatory Act of 1970 shall be in effect if it receives the affirmative vote of the majority of the legal voters thereon, otherwise the Act shall be ineffective.

Under Section 2 of the Act, the Board of Election Commissioners is charged with the duty of submitting the Special Election to the legal voters of the City of Chicago on Tuesday, June 8, 1971. If the question "carries", the election of the 15 members of the Board of Education shall be held on the 4th Tuesday of September, 1971 (Section 34-3.3).

Section 14-11 of the Election Code (Ill. Rev. Stat., 1969, Chap. 46, par. 14-11), dealing with the cost of elections, provides in part as follows:

> "In all elections held for the purpose of electing a member of a . . . school board, or for the purpose of voting upon a proposition or propositions *submitted by such board* and for no other purpose, such board shall pay the expense of such election." (Emphasis added.)

Therefore, it becomes necessary to determine the legislative intent as expressed in Senate Bill No. 1395 and Section 14-11 of the Election Code. In *Petterson* v. *City of Naperville,* [1956], 9 Ill. 2d 233 ,the court said (pp. 244-245):

"But the primary object of statutory construction is to ascertain and give effect to legislative intent. In ascertaining legislative intent, the courts should consider the reason or necessity for the enactment and the meaning of the words, enlarged or restricted, according to their real intent. Likewise, the court will always have regard to existing circumstances, contemporaneous conditions, and the object sought to be obtained by the statute. *People ex rel Holvey* v. *Kapp,* 355 Ill. 596; *Chicago Packing and Provision Co.* v. *City of Chicago,* 88 Ill. 221."

Other cases to the same effect are *People* v. *Holmes* [1968], 98 Ill. App. 2d 11; *People ex rel Cason* v. *Ring* [1968], 41 Ill. 2d 305.

Applying the foregoing principles of law to construing the provisions of Senate Bill No. 1395 and Section 14-11 of the Election Code, it is clear the legislature intended that the Board of Election Commissioners should pay the cost of a Special Election to be held on June 8, 1970 and, if the question "carries", to pay the cost of the election of the members of the Board of Education on the 4th Tuesday of September, 1971. Section 14-11 provides that the Board of Education shall pay the expense of the election if the same is "submitted by such board". Senate Bill No. 1395 specifically provides that the Special Election to be held on Tuesday, June 8, 1971, shall be held by the Board of Election Commissioners of the City of Chicago. Section 34-3.3 of Senate Bill No. 1395, providing for the election for members of the Board of Education on the 4th Tuesday of September, 1971, does not provide that the same shall be submitted by the Board of Education. On the other hand, Section 34-3.4 provides that if a vacancy exists in the Board of Education for more than 1 year before the expiration of the term of office, the same shall be filled by a Special Election called by the Board of Education.

From the foregoing, it is clear that it was the intention of the legislature that the expense for conducting the Special Election of June 8, 1971, and, if the question "carries", the election on the 4th Tuesday of September, 1971, "should be paid by the Board of Election Commissioners of the City of Chicago." It might well be that all subsequent elections pertaining to the Board of Education of the City of Chicago "submitted by such board", would be the expense of the Board of Education, as provided in Section 14-11 of the Election Code.

We are of the opinion that you should include in the 1971 Budget of the Board of Election Commissioners of the City of Chicago, the estimated expense of the Special Election of June 8, 1971 and, if the question "carries", the estimated expense of the election to be held "on the 4th Tuesday of September, 1971."

CIGARETTE TAX AND HOME RULE

(City Council—G. F. H.—May 26, 1972)

On May 19, 1972, the Illinois Supreme Court filed an opinion in *S. Bloom, Inc.* v. *Korshak,* affirming that part of the trial court's decision which held all but one section of the Chicago Cigarette Tax Ordinance (Chapter 178.1 of the Municipal Code) constitutionally valid and reversing that part of the trial court's decision which held invalid Section 178.1-4(b) of the Ordinance.

In its total affirmance of the validity of this Tax Ordinance, the Court ruled that the City had the power to enact the tax under the home rule provisions of the 1970 Illinois Constitution and that the Ordinance does not violate any principles of equal protection, due process, or equal taxation and it imposes no impermissible burden on interstate commerce.

COLLECTION OF CITY TAXES

(Shippers Traffic Service, Inc.—D. P.—July 11, 1969)

Your letter to the Tax Division of the City of Chicago has been referred to this office for consideration. You ask for information and forms relating to city and county taxation.

With the exception of the city motor vehicle license fee, which is directly collected annually by the City Clerk of Chicago, virtually all taxes which eventually accrue to the City of Chicago are collected by the Cook County Assessor's office and by the Illinois Department of Revenue. Other taxes, such as those on utilities, are collected by the supplier of service as part of its monthly service charge.

Should you require more information you may wish to communicate directly with the City Clerk of Chicago, City Hall, Chicago, Illinois; the Cook County Assessor, County Building, Chicago, Illinois; and the Illinois Department of Revenue, 160 N. LaSalle Street, Chicago, Illinois. Alternatively, you may find it more satisfactory to contact a private attorney who can advise your company as to tax liability.

NEW OWNERS LIABILITY FOR DRIVEWAY FEES

(Yellow Cab Company—J. K. M.—March 25, 1968)

In reply to your request for an opinion as to (A) whether a new property owner is responsible for driveway fees due prior to the date of purchase and (B) whether the new land owner is responsible for driveway fees accruing subsequent to date of purchase, it is our opinion that in both situations the new property owner will be liable. Driveway fees are considered to be incident to the property itself as real estate taxes are, and therefore run with the property. The fees were charged for the maintenance of the property and were prospective at the time of the inspection. The City will therefore look to the present property owner for collection of past driveway fees due and owing.

If the new purchaser feels that the seller should be responsible for the ultimate payment of the fees, this is a private matter between buyer and seller. The City, however, will hold the new purchaser responsible. For this same reason, driveway fees that become due subsequent to the purchase of the property are also considered the responsibility of the new purchaser. The City of Chicago cannot be expected to become aware of every real estate transaction in the City of Chicago and advise the new purchaser as to whether they wish a driveway continued. If the purchaser does not wish the existing driveway to be continued, it is incumbent upon him to advise the Street Department.

In the absence of being so advised, the City of Chicago will presume that the purchaser wishes the continued use of a driveway, and thus bill him accordingly.

HOTEL OCCUPANCY TAX

(Ass't. City Attorney, Albuquerque—D. P.—February 2, 1968)

Your letter of January 22, 1968, to Mr. Raymond F. Simon, Corporation Counsel, requests information relative to the Chicago "Hotel Occupancy Tax."

Pursuant to enabling legislation recently enacted by the Illinois General Assembly, the City of Chicago imposes a "Hotel Operators' Occupation Tax"; this tax is distinct from a similar one imposed by the State of Illinois. Revenue

from the municipal tax is to be disbursed "solely to promote tourism, conventions and other special events within said municipality or otherwise to attract non-residents to visit said municipality." (Ill. Rev. Stat. 1967, ch. 24, par. 8-3-13.)

Information as to the amount of revenue collected is available only for September and October of 1967, the first two months of collection: total revenue is $164,603.00. The revenue estimated for 1968 is $1,200,000.00.

We are enclosing for your use copies of the statutory authority for the state and local taxes as well as of the city ordinance imposing the local tax.

LIABILITY OF CITY UNDER LEASING OCCUPATION TAX ACT

(Supervisor of Disbursements, Office of the City Comptroller—S. R. D. —October 26, 1967)

We acknowledge receipt of your recent communication requesting an opinion as to whether the City of Chicago is liable under the Leasing Occupation Tax Act of the State of Illinois.

Section 3 of said Act (Ill. Rev. Stat. 1965, chap. 120, par. 453.103) provides, in part, as follows:

"The tax herein imposed does not apply to the renting or leasing of tangible personal property to any governmental body, * * *."

We are of the opinion, therefore, that the City of Chicago is not liable for a leasing occupation tax on rental equipment.

PAYMENT OF TAXES BY MUNICIPAL DEPARTMENT

(Commissioner, Department of Public Works—M. M. M.—March 11, 1971)

Your letter of March 4, 1971 addressed to Corporation Counsel, Richard L. Curry, has been referred to the writer for reply. You request an opinion concerning the legality of State Taxes and Municipal Taxes paid by your Department as part of the utility bills which are handled by the Bureau of Architecture.

Please be advised that the payment of both State taxes and Municipal taxes by your Department is legal under existing laws. The State Legislature in passing the State tax and enabling legislation for the Municipal tax made no provisions for any exemption and therefore all must pay these taxes.

With respect to the U.S. Tax Provision on Illinois Bell, please be advised that Federal Legislation provides exemption for State and Municipal Subscribers.

CITY OF CHICAGO AS LESSEE OF PARKING SPACES

(City Comptroller and Director of Financial Management—G. F. H.— December 18, 1972)

In response to your inquiry as to whether the City of Chicago, as lessee of parking spaces, must pay the City's parking tax, it is the opinion of this office that the City is liable for payment of the tax. This opinion is based on the existing

presumptions of law regarding the power to tax and the power to exempt from same. (See *People* v. *Bennett Medical College,* 248 Ill. 608, 609 (1911); 84 C.J.S. Taxation, Sec. 216.)

At present, the definition in the ordinance of persons liable for the parking tax includes municipal corporations (Section 156.1-1 of the Municipal Code of Chicago), and nowhere in the ordinance is the City of Chicago exempted. Thus, unless or until legislative action is taken by the City Council to exempt the City from the payment of tax, the tax applies to the municipal government whenever it leases parking spaces.

APPLICATION OF PARKING TAX TO RENT-FREE SPACES

(Commissioner, Department of Streets & Sanitation—G. F. H.—April 7, 1972)

It is the opinion of this office that the newly imposed Chicago parking tax is not applicable to and is not required to be paid by a person parking his motor vehicle in rent-free space.

This opinion is based on the following pertinent language of the ordinance. Section 156.1-1 provides in part:

> "Parking Lot" or "Garage" means any building, structure, premises, enclosure, or other place whether enclosed or not, except a public way within the City of Chicago, where two or more motor vehicles are stored, housed, or parked for hire, charge, fee, or other valuable consideration in a condition ready for use, or where rent or compensation is paid to the owner, manager or lessee of the premises for the housing, storing, sheltering, keeping or maintaining of such motor vehicles. . . ."

Section 156.1-2(a) establishes a tax upon the use and privilege of parking a motor vehicle in any parking lot or garage as defined in Section 156.1-1.

Section 156.1-2(b) further provides that:

> "The ultimate incidence and liability for payment of said tax is to be borne by the person who seeks the privilege of occupying space within said parking lot or garage, said person hereinafter referred to as 'recipient.' "

Section 156.1-2(d) requires that every operator of such a parking lot or garage collect the tax from the recipient, or parker, and Section 156.1-2(e) states that each person required to collect the tax shall secure the tax from the recipient or parker at the time he collects the charge or rent from the parker.

From the foregoing, it is clear that unless a fee is charged for parking and is collected from the parker, upon whom the incidence of tax falls, there is no basis in the ordinance for imposing the tax.

However, it is equally clear from the foregoing, that if a rental fee is charged for the parking space, the legal status of the owner or operator leasing or renting such space has no bearing on the duty of the parker to pay the tax. Thus, if either an association or a business rents or leases space to parkers, the parkers must pay the tax and the association or business must collect it.

Finally, if the City leases an entire lot, and the lessee then allows persons to park motor vehicles on that land without charge, there is no tax owing from those parkers. If, however, a lessee begins charging for parking on the leased land, he becomes the operator of a "parking lot" as defined in the ordinance, and persons parking in that lot must pay the tax along with the parking fee.

MUNICIPAL TAXES ON PUBLIC UTILITY BILLS

(Provincial Controller, Mercy Coordination Center—M. M. M.—June 12, 1968)

Your letter of May 27, 1968 addressed to Mr. Raymond F. Simon, corporation Counsel of the City of Chicago, has been referred to the writer for reply. In your letter you request an opinion as to why the Sisters of Mercy, a non-profit corporation, is not granted a tax exempt status for municipal taxes on public utility bills paid by them.

The City of Chicago is a creature of the Illinois State Legislature and, as such, has only the powers granted it by the Legislature. When the Illinois State Legislature granted the power to the City of Chicago to levy a public utility tax, it did not provide for the municipality to grant any exemptions therefrom. Therefore, no exemption may be granted by the municipality.

I might point out that the City of Chicago itself pays the municipal tax on all public utility services which it purchases. I might further add that in certain litigation which is in progress in various stages in the Federal Courts, it has been uniformly held that exemptions such as you speak of in your letter are unconstitutional since they form the basis for unreasonable discrimination.

APPLICABILITY OF RETAILER'S OCCUPATION TAX TO CITY

(Purchasing Agent—D. P.—August 2, 1967)

Your letter to Mr. Raymond F. Simon, Corporation Counsel, dated May 5, 1967, requests an opinion concerning the liability of the City of Chicago, under the Illinois Retailers' Occupation Tax, for its sales of salvage.

A threshold question is whether the tax is applicable to municipalities. The Department of Revenue's Rule No. 48, a copy of which is enclosed, declares a policy of collecting the tax from municipalities for sales made "other than in the performance of a governmental function." We believe that the Rule is supportable in law. The Illinois Retailers' Occupation Tax Act, Ill. Rev. Stat. 1965, Ch. 120, par. 440, includes in the definition of taxable "person" the phrase "public corporation," and the courts of Illinois have included municipalities in that phrase, *People* v. *Bartlett,* 304 Ill. 283, at 286.

The Act was amended in 1953 to exempt sales *to* municipalities (Laws 1953, p. 1310, sec. 1) apparently in recognition of the fact that the tax is ordinarily passed on to consumers. Therefore, the City escapes the final incidence of the tax as an ultimate consumer, but incurs liability when it is in a position to pass the tax on to another consumer.

Conceding the applicability of the tax to the City, and believing that in the sale of salvage the City is not exercising a governmental function, we must look to the statute's operative provisions and examine the sales involved to determine whether they are included transactions.

The Illinois Retailers' Occupation Tax Act, set out in Ill. Rev. Stats. 1965, Ch. 120, pars. 440 *et seq.,* taxes persons engaged in the business of selling tangible personal property at retail. The Act . . . a "sale at retail," so far as here relevant, as one "for use or consumption, and not for resale in any form as tangible personal property" (par. 440). The Supreme Court of Illinois has interpreted "use or consumption" to mean "any employment of a thing which takes it . . . the retail market so that it is no longer an object of the tax." (*Material Service Corp.* v. *Isaacs,* 25 Ill. 2d 137, at 139).

According to your letter, some 95% of all salvage sold is intended for resale. Assuming that the transactions are within the definitions expressed above, it follows that that percentage would not be subject to tax liability.

Article 13, issued by the Department of Revenue with reference to the retailers' occupation tax states: "Mere statements by sellers . . . property was sold for resale will not be accepted by the Department without corroborative evidence." Prima facie proof is provided by a Certificate of Resale, that is, "a statement signed by the purchaser that the property purchased by him is purchased for purposes of resale." In addition, such purchaser must himeself have been issued a "resale order" by the Department of Revenue. This information is explained in greater detail in the enclosed copy of Article 13.

Your letter does not contain sufficient information to make a determination respecting the remaining 5% of your salvage sales, those you have not described as being for resale. Assuming that they are not for resale, it is possible that they are taxable under the statute. Depending on the manner in which your office handles these sales, it may be possible to take advantage of an exemption for

> "The isolated or occasional sale . . . by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property. . . ." [Ill. Rev. Stat. 1965, Ch. 120, par. 440].

Should this provision be inapplicable, the City will be liable for the tax to the extent of that percentage, and it will be necessary for your office to register with the Department of Revenue, that is, to make reports to the State of Illinois Retailers' Occupational Tax Division."

With respect to the majority of your sales, however, compliance with the procedures described in the enclosed Article 13 should obviate the need to file a return for purposes of the retailers' occupation tax.

TAX LIABILITY OF CITY ON SALE OF SALVAGEABLE ITEMS

(Purchasing Agent—S. R. D.—September 3, 1971)

We acknowledge receipt of your recent communication requesting our opinion as to whether the City is liable for the Illinois Retailers' Occupation Tax on the sale by the City of its salvageable items, including approximately $500,000 or $600,000 worth of scrap iron or steel each year.

Section 1 of the Retailers' Occupation Tax Act (Ill. Rev. Stat., 1969, chap. 120, par. 440) provides, in part, as follows:

> "The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail does not constitute engaging in a business of selling such tangible personal property at retail within the meaning of this Act."

Numerous cases have interpreted the application and interpretation of the Retailers' Occupation Tax Act. In *Fischman & Sons* v. *Department of Revenue* (1957), 12 Ill. 2d 253, the court stated (p. 254):

> "Numerous decisions of this court establish that the retailers' occupation tax is laid upon the privilege of engaging in the business of selling personal property at retail to purchasers for use or consumption, (*Reif* v. *Barrett,* 355 Ill. 104; *Franklin County Coal Co.* v. *Ames,* 359 Ill. 178; *People's Drug Shop, Inc.* v. *Moysey,* 384 Ill. 283,) while the Retailers' Occupation Tax Act itself ordains that the tax shall be imposed upon the gross receipts from such sales of tangible personal property."

In *Central Television Service* v. *Isaacs* (1963), 27 Ill. 2d 420, the plaintiff was engaged in the business of servicing and repairing television sets and electrical equipment of all kinds, motor vehicles, shoes and boats. The court, in construing the nature of the Retailers' Occupation Tax Act, said (pp. 426-427):

> "It is not a tax on the privilege of buying, or upon the individual sale—it is a tax upon the occupation of selling at retail (*Revzan* v. *Nudelman*, 370 Ill. 180, 183; *Svithiod Singing Club* v. *McKibbin*, 381 Ill. 194, 199)—an occupation in which plaintiffs are not engaged. The State contends plaintiffs are engaged in a taxable occupation and plaintiffs concede their occupation to be taxable—but not under an act taxing the business of engaging in retail sales."

Likewise, the City of Chicago is making individual or occasional sales of its salvageable items. It is not engaged in the occupation of selling at retail.

In *Robinson Products Co.* v. *Nudelman* (1945), 389 Ill. 281, the court stated (p. 284) that "under the act in this State a tax is not due where sales, though at retail and for use and consumption and not for resale, are merely incidental to a business which the vendor is licensed or authorized to transact."

In *Svithiod Singing Club* v. *McKibbin* (1942), 381 Ill. 194, the court in construing the Act, said (pp. 199-200):

> "The tax is not a privilege tax imposed upon purchasers. It is not a property tax upon the items sold, but is an occupation tax upon a class of vendors engaged in the business of selling tangible personal property at retail. It seems clear from these considerations that the term 'business,' as used in the act, is to be construed in its usual and popular sense, (*Revzan* v. *Nudelman supra, Bradley Supply Co.* v. *Ames, supra,*) and, as used in the act, indicates the business of selling in the commercial sense.
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> * * *
>
> "It is thus clear that a tax is not due and payable where sales, though at retail and for use and consumption and not for resale, are merely incidental to a business which the vendor was licensed or authorized to transact."

It is obvious that the City of Chicago, which is a municipal corporation, is not engaged in the occupation of selling personal property at retail to purchasers for use or consumption. Any sale of personal property made by the City is an "isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged or who does not habitually engage in selling such tangible personal property at retail" and, therefore, is not subject to pay a tax within the meaning of the Act.

In light of the foregoing, we are of the opinion that the City of Chicago is not liable under the Retailers' Occupation Tax Act for the sale of $500,000 to $600,000 worth of scrap iron or steel each year, or for the sale of any of its other personal property.

SENIOR CITIZENS SPECIAL BENEFITS

(J. A. P.—D. P.—August 17, 1967)

Mayor Richard J. Daley has directed this office to consider your recent letter addressed to him. You state your understanding that some States and communities offer senior citizens special benefits on property and other taxes. You wish to know if Chicago gives senior citizens any special tax benefits.

The City of Chicago has no law whereby senior citizens are given any tax advantage not enjoyed by all citizens. We point out, however, that certain public housing is available only to the senior citizens of our community. And all senior citizens, of course, may avail themselves of an additional deduction with respect to the federal income tax, and of special programs such as Medicare and Social Security.

Should you believe that special tax benefits for senior citizens are desirable, you may find it helpful so to inform your alderman and state representatives; they may then bring the matter to the attention of the City Council and the General Assembly.

TOBACCO PRODUCTS TAX

(Purchasing Agent—F. P. K.—November 20, 1969)

In your letter of November 12, 1969, you inquire whether the City is exempt from the tax under the above act.

The legislation, as enacted, is a tax on persons engaged in the business of distributing tobacco products in this state, other than cigarettes, at the rate of 20% of the wholesale price. It is imposed in addition to all other occupation or privilege taxes of the State, any political subdivision thereof, or by any municipal corporation.

No basic exemptions are provided by the Act except such activities not the subject of tax under the Constitution and Statutes of the United States. Therefore, the answer to your question is that the City is *not* exempt.

However, in a very recent decision challenging the tax, it has been declared unconstitutional. Until such holding is considered final, or is tested on appeal, collection of the tax will probably continue.

CHICAGO URBAN TRANSPORTATION DISTRICT ANNUAL APPROPRIATION ORDINANCE

(Board of Trustees, Chicago Urban Transportation District—S. R. D. —February 3, 1971)

We are of the opinion that it would be expedient for the Board of Trustees to enact a 1971 Appropriation Ordinance and Tax Levy, which will be payable in the year 1972. There are two problems to be considered in the preparation and passage of the Appropriation Ordinance, namely:

1. The amount to be appropriated and the purpose for which each appropriation is made;

2. The various steps necessary to be taken to enact the Appropriation Ordinance.

Section 12 of the Urban Transportation District Act (Ill. Rev. Stat., 1969, chap. 111⅔, par. 512) provides, in part, as follows:

"Any Urban Transportation District organized under the provisions of this Act may levy and collect a general tax for corporate purposes on the real and personal property situated in such district, but the aggregate amount of taxes levied for any one year for such corporate purposes shall not exceed the rate of .10 per cent of the value of taxable property as equalized or assessed by the Department of Revenue."

The estimated 1969 Equalized Assessed Values for the District are as follows:

Real Estate	$1,799,654,371
Personal Property	1,264,435,000
Railroad	35,910,629
Total	$3,100,000,000

The Referendum, passed at the November 1970 Election, provided that individual personal property taxes shall be eliminated from the tax rolls in 1971. In a recent opinion by Illinois Attorney General William J. Scott, it was determined that the personal property of individuals, partnerships and other non-incorporated businesses should also be eliminated from the tax rolls in 1971. In addition, there has been added a homestead exemption. Under Section 5(c) of Article IX of the Constitution of 1970, the General Assembly is directed to abolish all ad valorem personal property taxes subsequent to January 2, 1971 but before January 1, 1979. Consequently, it will be necessary to make an estimate of these probable exemptions and reduce the 1969 valuations of personal property before applying the tax rate. It is suggested that the personal property and railroad assessments be computed at 50% of their equalized assessed values. The equalized assessed values of the personal and railroad property in the District is $1,300,345,629.

50% of this amount equals	$ 650,172,814
Real Estate Equalized Assessed Value	1,799,654,371
Total	$2,449,827,185

Applying the tax rate of .10% results in a net amount of $2,449,827 which may be appropriated in 1971 for the District's corporate purposes and must include a Loss and Cost items which, it is recommended, should be 10% of the amount to be appropriated.

It is suggested that the Trustees list the various items of probable expenditure and the amount thereof, the total amount of which should not exceed the sum of $2,449,827.

After the Board of Trustees has determined the amount of estimated income and the various items of expenditure and the total amount thereof, we will prepare an Appropriation Ordinance and Tax Levy for passage by the Board of Trustees.

You must also consider the method of enacting the Appropriation Ordinance. Section 12 of the Act further provides, in part, as follows:

> "The tax herein provided for shall be levied at the same time and in the same manner as nearly practicable as taxes are now levied for city and village purposes under the laws of this State."

The District contains less than 500,000 inhabitants and, therefore, the following provisions of Section 8-2-9 of the Municipal Code of Chicago (Ill. Rev. Stat., 1969, chap. 24, par. 8-2-9) apply:

> "In municipalities with less than 500,000 inhabitants, the corporate authorities shall pass an ordinance within the first quarter of each fiscal year, to be termed the annual appropriation ordinance."

Section 3.08 of the Rules of the Chicago Urban Transportation District provides that the District shall operate on a fiscal basis, beginning January 1st and ending December 31st of each year. Therefore, the Appropriation Ordinance of the District should be enacted prior to April 1, 1971.

Section 8-2-9 does not require a public hearing before passage of the appropriation ordinance, but you may deem it advisable to do so.

Section 1-2-4 of the Illinois Municipal Code (Ill. Rev. Stat., 1969, chap. 24, par. 1-2-4) provides, in part, as follows:

> "All ordinances . . . making any appropriation, shall . . . be published at least once, within 10 days after passage, . . . in one or more newspapers with a general circulation within the municipality."

In accordance with the provisions of Section 1-2-4, it will be necessary to publish the Appropriation Ordinance at least once within 10 days after passage in a newspaper with a general circulation within the District.

After the passage of the Appropriation Ordinance and its publication within 10 days thereafter, it is necessary to comply with the pertinent provisions of Section 8-3-1 (Ill. Rev. Stat., 1969, chap. 24, par. 8-3-1), which pertains to the passage and filing of the Tax Levy Ordinance. The pertinent provisions of Section 8-3-1 are as follows:

"The corporate authorities may levy and collect taxes for corporate purposes.

They shall do this in the following manner:

On or before the second Tuesday in September in each year, the municipalities with less than 500,000 inhabitants, . . . the corporate authorities shall ascertain the total amount of appropriations legally made for all corporate purposes to be provided for by the tax levy of that year. Then, by an ordinance specifying in detail in the manner authorized for the annual appropriation ordinance of the municipality, the purposes for which the appropriations have been made and the amount appropriated for each purpose respectively, the corporate authorities shall levy not to exceed the total amount so ascertained upon all property subject to taxation within the municipality as that property is assessed and equalized for state and county purposes for the current year.

"A certified copy of this ordinance shall be filed with the county clerk of the proper county. He shall ascertain the rate per cent which, upon the full, fair cash value of all property subject to taxation within the municipality, as that property is assessed or equalized by the Department of Revenue, will produce a net amount of not less than the total amount so directed to be levied. The county clerk shall extend this tax in a separate column upon the books of the collector of state and county taxes within the municipality."

After the foregoing procedure has been completed, the tax levy for the District will have been completed and the taxes so levied will be payable in the early months of 1972.

FEES FOR INSPECTION OF MECHANICAL VENTILATING SYSTEMS

(City Comptroller—F. G. S.—August 14, 1970)

Your letter of recent date addressed to Richard L. Curry, Corporation Counsel, to which was attached a copy of a letter dated July 10, 1970, from the Midwest Association of Automatic Laundry Stores, has been referred to the undersigned for reply.

The letter from Midwest Association of Automatic Laundry Stores protests inspection fees assessed by the City of Chicago against self-service coin-operated laundry store owners for inspection of their mechanical ventilation and contends that these fees are automatically covered by the Annual license fee.

The appropriate Sections of the Municipal Code of Chicago which have application to the matter at hand are Sections 145-24.6, Sections 46-40 and 46-41, and Section 101-14.

Section 145-24.6 of the Municipal Code provides:

"The annual license fee for each self-service coin-operated laundry establishment is hereby fixed as follows: $150.00 for each establishment having fifteen or less self-service coin-operated machines and $5.00 for each machine in excess of fifteen machines maintained upon the premises."

Section 46-40 of the Municipal Code provides:

"Every mechanical ventilating system shall be inspected annually by the commissioner of buildings."

Section 46-41 of the Municipal Code provides:

"The fee for such annual inspection shall be one dollar and fifteen cents per one thousand cubic feet of air per minute or fractional part thereof of air required by the building provisions of this code to be circulated for ventilating purposes, including the sum of mechanical supply and exhaust systems; provided, however, that no such charge shall be less than four dollars and seventy-five cents."

Section 101-14 of the Municipal Code provides:

"No license or permit shall be issued to any person indebted to the City, unless and until such persons pay to the City all indebtedness then due from such person or by authority of the City Council otherwise discharges all such indebtedness in accordance with the terms and conditions fixed by the City Council."

The writer of the letter you attached cites Sections 145-3, 145-7 and 145-22 of the Municipal Code of Chicago which require respectively: An investigation of the premises upon application for a license to determine compliance with respect to sanitary requirements and other provisions of Chapter 145; compliance with ventilation requirements of the Municipal Code and enforcement of provisions of the Municipal Code and laws by appropriate agencies of the City.

The provisions of Sections 46-40 and 46-41 of the Municipal Code are specific and mandatory insofar as annual inspections of mechanical ventilating systems are required and the fees to be charged therefor.

The imposition of a reasonable inspection fee is not a tax and is usually regarded as compensation for the benefit conferred by such inspection. "Inspection laws are not regarded as imposing burdens upon trade, nor as unjustly discriminating in favor of one class at the expense of another, so long as they are reasonable."

People v. Harper 91 Ill. 357.

C. W. & V. Coal Co. v. People, 181 Ill. 270.

The provisions of Sections 46-40 and 46-41 of the Municipal Code requiring annual inspections of mechanical ventilating systems and establishing a fee therefor apply without regard to the nature of the business or operation conducted, for which there may or may not be a license requirement. There is no conflict in this instance with the license requirements for self-service coin-operated laundries under Chapter 145 of the Municipal Code.

There is no language in Chapter 145 which makes the inspection of mechanical ventilating systems and the fees to be charged therefor automatically a part of the license fee imposed under Section 145-24.6 of the Code.

The City's right to license self-service coin-operated laundries was upheld in Gibbons et al. v. The City of Chicago (34 Ill. 2d 102). The Court in the Gibbons case found no evidence in the record to show that the fees imposed, namely the license fee and the annual fee for an attendant's certificate of fitness, were not reasonably related to the burdens placed upon the City because of the regulating provisions of the ordinance.

It is our opinion that the fees due the City of Chicago for the annual inspection of mechanical ventilating systems are validly imposed. Where there is a failure to pay such fees by anyone responsible for the payment thereof, the provisions of Section 101-14 of the Municipal Code are properly applied until the fees due and owing the City of Chicago are fully paid.

USE OF WATER FUNDS AND PROPERTY FOR UNRELATED PURPOSE

(Administrative Officer, Mayor's Office—S. R. D.—November 29, 1967)

We acknowledge receipt of your memorandum of November 14, 1967, requesting our opinion as to whether "we need an ordinance for the Public Vehicle License Commissioner to use the 14th and Indiana Water Fund property for erecting a taxicab testing facility."

This office has rendered numerous opinions to the effect that Water Funds and property acquired therefrom cannot be used or appropriated for other than waterworks' objects and purposes. On December 16, 1926, this office rendered an opinion to the effect that land purchased with Water Funds' money could not be conveyed to the Police Department without the transfer of the reasonable value of the property from the General Corporate Fund to the Water Fund (Opinions of Corporation Counsel, Vol. 15, p. 507).

On August 5, 1929, this office rendered an opinion that property owned by the Water Fund could not be used as a public street for traffic between Chicago Avenue and Pearson Street, without the payment of the reasonable value therefor to the Water Fund. However, it is interesting to note, that a Own Your Own Home Exposition was permitted to use the property and erect certain buildings thereon with the understanding that the Exposition would remove the buildings and vacate the property on request of the Commissioner of Public Works (Opinions of Corporation Counsel, Vol. 18, p. 792).

On September 22, 1960, this office rendered an opinion to the effect that certain property acquired by the use of Water Funds could not be transferred to the Chicago Park District for playground purposes. It was suggested that the parcels be sold or leased by the City of Chicago and that any proceeds therefrom be paid into the Water Fund Account (Opinions of Corporation Counsel, Vol. 24, p. 670).

Section 11-133-3 of the Illinois Municipal Code (Ill. Rev. Stat. 1965, chap. 24, par. 11-133-3) deals with Water Funds in municipalities with a population of 500,000 or more and provides, in part, as follows:

> "Whenever certificates of indebtedness are issued pursuant to this Division 133, the entire revenue received from the operation of the waterworks system shall be deposited in a separate fund, designated as the water fund of the municipality of. . . . This fund shall be used only in paying (1) the cost of maintenance and operation of the waterworks system, (2) obligations of the municipality theretofore issued that are payable by their terms from this revenue, whether in the form of certificates, bonds, or otherwise, and (3) certificates, issued pursuant to this Division 133."

In *The People* v. *Hummel* (1905), 215 Ill. 71, it was held that under similar special charter provisions of the City of Chicago, Water Fund money could be used only for the purposes for which it was received. To the same effect is *The People* v. *Brand* (1945), 389 Ill. 298.

There is one provision in the Municipal Code of Chicago which apparently conflicts with the foregoing. Section 7-50 of the Municipal Code of Chicago provides, in part, as follows:

> "The comptroller shall have authority to permit any department of the city government to use any real estate owned or leased by the city and not otherwise occupied, for a period of not more than two years."

It is doubtful that this provision is applicable to property purchased with money from the Water Fund. Water Fund property is, in effect, held in trust

by the City of Chicago for the benefit of the holders of bonds and other certificates of indebtedness issued by the City of Chicago for waterworks' purposes. Water Fund property, being trust property, should bring the reasonable value therefor, be it either by way of lease or sale.

Summarizing the foregoing, it is our opinion that the City of Chicago should either lease or purchase the 14th and Indiana Water Fund property to be used by the Public Vehicle License Commissioner for a taxicab testing facility. We are of the further opinion that the lease or purchase of the property should be accomplished by way of an ordinance.

NATURE AND SCOPE OF WHEEL TAX

(R. R. R.—Deputy City Clerk—D. P.—February 11, 1969)

The City Clerk of Chicago has asked this office to consider your request, dated January 16, 1969, concerning the Chicago motor vehicle license (wheel tax). Your letter poses six questions dealing with the constitutionality of the wheel tax, its interpretation and its application to your client. In our response, we refer to each individually as it is taken up, rather than in the order as set forth in your letter.

As a preliminary matter, we note that the statute on which you rely, Illinois Revised Statutes 1967, chapter 24, paragraph 11-31-1, by its terms applies only to municipalities "incorporated under special law." This does not include the City of Chicago (cf. *Biffer* vs. *City of Chicago,* 278 Ill. 562) which, in 1874, adopted the Cities and Villages Act and which now, like most Illinois municipalities, derives its power to tax under Illinois Revised Statutes 1967, chapter 95½, paragraph 32a, and chapter 24, paragraph 8-11-4. These latter sections do not limit the taxation of business entities to their "domicile" or to any particular municipality; rather, an owner may be taxed by a municipality in which he "resides." And where anyone resides is, of course, a matter dependent upon the facts of the given situation. In answer to your 4th question, then, we believe that the ordinance definition (Municipal Code of Chicago, chapter 29, section 29-1) of "residing within the city" requires factual determinations sufficient to establish residence within the meaning of the above-cited statutes.

With reference to your 3rd question, as to the meaning of "a municipality other than the City of Chicago," in section 29-2 of the Wheel Tax Ordinance, we think the quoted phrase clearly refers to other Illinois municipalities in addition to municipalities in other states. This reflects the fact that the enabling statutes are only concerned, again, with the residence of the owner (and use within the taxing municipality), not with the vehicle's place of registration.

Your 1st, 5th and 6th questions ask whether the ordinance is unconstitutional. We find no issue of constitutional proportions. The ordinance cannot discriminate against non-residents since it only applies to residents. Since it taxes the privilege of using only the streets of Chicago, and nowhere else, it cannot result in double taxation. While we may thus assert the constitutionality of the ordinance on its face, the question of its constitutionality "as applied" depends upon a fuller knowledge of the factual situation of your client than is available from your letter; limiting our opinion to the facts in your letter, however, we see no invalidity on constitutional grounds.

Your remaining question, number 2, appears to be of critical importance insofar as advising your client is concerned; for this reason we are reluctant to make any conclusive ruling at this time, as to whether your client is within the ordinance. While the facts, as set out in your letter, indicate a likelihood of tax liability, it would seem prudent nevertheless to permit you to make an independent assessment in the light of the ordinance and our position as set out above.

Section B. MANAGEMENT OF CITY FUNDS

OFFICIAL NEWSPAPER ADVERTISING

(Purchasing Agent—F. G. S.—November 25, 1970)

Your letter of November 17, 1970, addressed to Richard L. Curry, Corporation Counsel has been referred to the undersigned for attention and reply. In your letter you request an opinion as to whether the Lerner Booster Newspapers a chain of 42 community newspapers meet the criteria for your contract on official newspaper advertising. You attach a copy of a letter from the Lerner Booster Newspapers advising that they would like to enter a bid for legal advertising for the City of Chicago as well as its affiliated agencies.

Chapter 26, Section 26-16 of the Municipal Code of Chicago provides as follows:

"The purchasing agent shall annually, on the first Monday of December, advertise in such daily newspaper or newspapers published in the city as he may select, inviting proposals for the following contract:

For the publication in any newspaper published in the English language, being published at least five times a week, of those matters and things required by law or any ordinance of the city to be published in a newspaper.

Such advertisement shall be published for ten consecutive days.

All such bids shall be received, opened and acted upon in conformity with the provisions of the Municipal Purchasing Act, being Article 22A of the "Revised Cities and Villages Act" of Illinois, as amended.

No advertisement for any city printing whatsoever shall be given or let to any newspaper in the city which in its columns has taught, or teaches, advocates, or abets any measures, or any people, who have for their object the overthrow by force or illegal means, of the laws of the nation, the state, or the city.

Nothing in this section shall be held to apply to any printing, notices or advertisements of the board of local improvements."

It is not apparent from your letter or the letter from Lerner Booster Newspapers whether they publish a newspaper in the City of Chicago in the English language at least five times a week. If the Lerner Booster Newspapers publish a newspaper in the City of Chicago in the English language at least five times a week, they may submit proposals for a contract in accordance with the provisions of Section 26-16 of the Municipal Code. If, however, the Lerner Booster Newspapers do not publish a newspaper in the English language at least five times a week. Section 26-16 of the Municipal Code would preclude consideration of their proposal for a contract.

INVESTMENT BY CITY IN CERTIFICATES OF DEPOSIT ISSUED BY OUT-OF-STATE BANK

(City Comptroller—S. R. D.—January 11, 1971)

You have requested our opinion as to whether the City of Chicago can invest in certificates of deposit issued by an out of state bank.

Section 2 of the Investment of Public Funds Act (Ill. Rev. Stat., 1969, Chap. 85, par. 902) provides in part as follows:

"Any public agency may invest any public funds in bonds, notes, certificates of indebtedness, treasury bills or other securities now or hereafter issued by and constituting direct obligations of the United States of America or may invest in certificates of deposit or time deposits constituting direct obligations of any bank as defined by the Illinois Banking Act, as heretofore and hereafter amended, provided, however, that investments may be made only in those certificates of deposit or time deposits in banks which are insured by the Federal Deposit Insurance Corporation * * * *."

A bank, as defined in Section 2 of the Illinois Banking Act (Ill. Rev. Stat., 1969, Chap. 16½, par. 101), is as follows:

" 'Bank' means any person doing a banking business whether subject to the laws of this state or any other jurisdiction."

The provisions of Section 21-9 of the Illinois Municipal Code (Ill. Rev. Stat., 1969, Chap. 24, par. 21-9) have no application to the investment by the City of certificates of deposit. The provisions of Section 21-9 apply to deposit of City funds to be used for the daily expenses and expenditures and not for the investment of the various securities set forth in Section 2 of the Investment of Public Funds Act.

In light of the foregoing, we are of the opinion that the City of Chicago has the power to invest in certificates of deposit issued by an out of state bank.

USE OF COMMUNITY IMPROVEMENT BOND FUND

(City Comptroller—S. R. D.—January 10, 1968)

We acknowledge receipt of your recent communication requesting an opinion as to whether rental under the proposed lease for office space at 130 N. Wells Street, Chicago, Illinois, can be charged to Fund 429-1320-801 for the Community Improvement Bond Fund. It is contemplated that personnel and equipment of the Department of Development and Planning will occupy the space.

The ordinance providing for the authorization of Redevelopment Bonds of the City of Chicago (C.J. 7-11-66, p. 6976) provides that the bonds shall be issued "for the purpose of paying all or part of projects for aid in the development of areas within said City, including the rehabilitation of slum and blighted areas and the acquisition and development or redevelopment of any other areas which may constitute a redevelopment project within said City. as defined in paragraphs 91.101 to 91.136, inclusive, of Chapter 67½ of the Illinois Revised Statutes, 1965."

The Urban Renewal Consolidation Act (Ill. Rev. Stat. 1967, chap. 67½, pars. 91.101 to 91.136, inc.) pertains to Slum and Blighted Areas (Ill. Rev. Stat. 1967, chap. 67½, pars. 91.109 to 91.119, inclusive) and Conservation Areas (Ill. Rev. Stat. 1967, chap. 67½, pars. 91.120 to 91.123, inclusive). Section 24 to Section 30 of the Act (Ill. Rev. Stat. 1967, chap. 67½, pars. 91.124 to 91.130, inclusive) pertain to the Powers and Authorities of Municipalities and provide, among other things, that the City may issue general obligation bonds for the purpose of raising funds to be used by the Department of Urban Renewal for the purposes set forth in said Act; that the City may assign or loan any of its employees to the Department of Urban Renewal in aid of the performance of the work of the Department and provide the necessary office space, equipment, or other facilities for the Department; and that the City may have and exercise all of the powers and functions vested in the City by virtue of any statute as shall be necessary to effectuate the purposes of the Act.

The Commissioner of Development and Planning has the duty (Municipal Code of Chicago, Section 7.1-3) to supervise and coordinate the formation and execution of physical improvement projects and programs affecting the present and future development of the City including urban renewal and public housing.

Therefore, the Department of Development and Planning is charged with the duty of cooperating with the Department of Urban Renewal in accomplishing the purposes of the Act.

On January 9, 1968, Mr. Raymond F. Simon, Corporation Counsel, had a telephone conversation with Mr. Lewis W. Hill who is Commissioner of the Department of Development and Planning and also the Commissioner and Chairman of the Department of Urban Renewal. Mr. Hill stated that the personnel and equipment contemplated to occupy the office space at 130 N. Wells Street, Chicago, Illinois, will be directly involved in aid of the redevelopment projects and conservation areas in the City in the manner provided by the Act.

In view of the fact that the office space at 130 N. Wells Street, Chicago, Illinois, will be used for the purposes set forth in the Redevelopment Bond Ordinance, the rental therefor may be charged to Fund 429-1320-801 Community Improvement Bond Fund.

APPROPRIATION OF FUNDS TO PROTECT CITY DEMOLITION LIENS

(City Comptroller—R. S. C.—February 9, 1968)

In your letter of January 22, 1968, you inquire as to the feasibility of setting "up a revolving fund of some $150,000.00 to provide for the payment of back taxes upon foreclosures of City demolition liens upon real estate in various parts of the City." You point out that the "City will sell this property to the Chicago Housing Authority and the net proceeds from the sale will be credited to this revolving fund for re-use in acquiring additional properties against which demolition liens have been assessed. The CHA, in turn, will construct residences on the small plots of ground and will sell such realty to poor people who will live in them."

In an endeavor to obtain the necessary funds you ask: "Can we legally construe that the purposes of bond fund 421—Slum Clearance Bonds of 1957, or bond fund 429—Community Development Bonds for Neighborhood Improvement (bonds of 1966), are broad enough to permit transferring funds from one of them as a loan in order to establish the revolving fund mentioned above."

It is our opinion that the bond funds cannot be construed so as to permit transferring of funds for the purpose mentioned.

First, it should be noted that the payment of back taxes would not necessarily confer title to the real estate involved. There are other interests to be considered, including perfecting title through appropriate legal proceedings as well as the competing interests of other lien holders. The City might not ever acquire title, and would not, therefore, have anything to sell the CHA.

Furthermore, the Slum Clearance Bonds of 1957 (bond fund 421) specifically state (Journal of Council Proceedings, September 19, 1957, p. 5955): "Section 7. No part of the proceeds of the bonds hereby authorized shall be appropriated and paid to the Land Clearance Commission of the City of Chicago unless and until the resolution of said Commission determining the particular slum or blighted area to be acquired and redeveloped has been approved by the City Council, except insofar as payment of such moneys to the Land Clearance Commission may be necessary in order to match State funds under allocations which would otherwise expire."

In considering the Redevelopment Bonds of 1966 (bond fund 429) they are found to state that they are (Journal of Council Proceedings, July 11, 1966, p. 6976) "for the purpose of paying all or part of projects for aid in the development of areas within said City, including the rehabilitation of slum and blighted areas and the acquisition and development or redevelopment of any other areas which may constitute a redevelopment project within said City, as defined in paragraphs

91.101 to 91.136, inclusive, of Chapter 67½ of the Illinois Revised Statutes, 1965." (We have considered this last mentioned statute and find that it does not affect this inquiry.)

They further state (Journal of Council Proceedings, July 11, 1966, p. 6979): "Section 7. No part of the proceeds of the bonds hereby authorized shall be expended unless and until there has been an appropriation therefrom duly made by the City Council prior to such expenditure stating the specific object or purpose for which the same is to be expended."

It seems plain that the funds obtained from these bond issues are to be used for particular programs of rehabilitation of slums and blighted areas. What is required is City Council approval of a particular development project.

As outlined in your letter the primary purpose of the funds you wish to obtain is to provide the City with capital to pay back taxes in order to protect the City's demolition liens upon real estate in various parts of the City. Although reference is made to selling the property to the CHA there is nothing to indicate that this is to be part of a particular redevelopment program. If the fund was to be incidental to such a program and if this program and the appropriation of funds was approved by the City Council, a different conclusion could be reached.

PROVIDING A FINANCIAL STATEMENT TO A PRIVATE SOURCE

(City Treasurer—F. G. S.—April 8, 1971)

Your letter of March 31, 1971, addressed to Richard L. Curry, Corporation Counsel, has been referred to the undersigned for attention and reply. In your letter you advise that you have received a request from a private source to furnish copies of your financial statements for certain periods and that the person making the requests referred to Sections 7-6 and 7-39 of the Municipal Code as the basis for compliance with this request. You request an opinion for an interpretation as to whether or not said sections contain implied authority to provide the financial statements requested.

A review of the matter reveals that Section 7-6 of the Municipal Code provides for certain reports to be made by the Treasurer to the Comptroller at the end of each month or more often if required by the Comptroller. The section further provides that the books, and all papers and files of the Treasurer's office *shall* at all times *be open to the examination of the Comptroller, the Committee On Finance or any member of the City Council.* (Emphasis added.) Section 7-39 of the Municipal Code provides that the Treasurer shall make a monthly report to the Comptroller of all interest monies received by or credited to the Treasurer or the City.

It is our opinion that neither of these sections authorizes or requires the Treasurer to provide private individuals with financial statements for any given period.

We call your attention to Section 7-21 of the Municipal Code which provides as follows:

> "The comptroller shall make out an annual statement, on or before the first day of April, in each year, giving a full and detailed statement of all receipts and expenditures during the preceding fiscal year. Such statement shall also detail the liabilities and resources of the city, and all other things necessary to exhibit its true financial condition. He shall submit the same to the city council in printed form, accompanied by the certification of a public accountant not connected with the city government and who has been appointed by the finance committee.
>
> Such accountant shall certify that the statements contained in the comptroller's report are true reflections of the books of his office, which books have

been correctly kept in accordance with the daily departmental reports and other returns of the city's transactions after audit and verification by the various divisions within his office."

The Comptroller's office advises that the financial statement required by Section 7-21 of the Municipal Code is published in pamphlet form and is widely circulated.

Any person seeking a financial statement for a given fiscal year could secure such a statement by directing his request to the office of the Comptroller of the City of Chicago.

APPROVAL OF LEASES OF NAVY PIER SPACE

(Deputy Port Director, Seaport of Chicago—A. H.—September 19, 1967)

Your recent letter addressed to Raymond F. Simon, Corporation Counsel, containing proposed leases of Navy Pier space, a $5,000.00 certified check (No. 4782 drawn on Harris Trust and Savings Bank, dated Sept. 5, 1967), and a letter of transmittal to the Port Director from the Independent Housewares/Mass Merchandise Exhibit, Inc., has been referred to the undersigned for consideration and response. You note that the City Council is presently considering leases covering similar dates sought by Independent Housewares, submitted by a competitive operator named Transworld Exhibits, Inc., and you ask to be advised of your position in this matter.

In accordance with Chapter 8.3, Section 8.3-5, Municipal Code of Chicago, the proposed leases of Navy Pier space should be transmitted to the City Comptroller for approval and referred to the City Council for consideration and authorization as provided in Chapter 7, Section 7-50, of the Municipal Code. The City Council will then be in a position to exercise its best judgment with respect to which of the putative leases submitted by the competitive operators would be to the best advantage of the City of Chicago.

We are taking the liberty of forwarding said leases and the $5,000.00 check to the Comptroller so that the appropriate procedures may be commenced.

USE OF SURPLUS REVENUE ACCOUNT

(City Comptroller—B. Q. O'B.—August 2, 1967)

This is in reply to your correspondence of June 19, 1967 and July 7, 1967, addressed to Mr. Raymond F. Simon, Corporation Counsel, wherein you request an opinion relating to the above subject matter.

In your letter of June 19, 1967, you state as follows:

"The Bureau of Parking is moving from its rented quarters on Wacker Drive to 54 West Hubbard Street and estimates that certain decorating, reconditioning costs and improvements to the premises on West Hubbard Street will cost $50,000.

"The question arises as to *whether the Surplus Revenue Account* of the Parking Fund *can be used to pay the cost of these improvements and reconditioning* costs.

"The use of this Surplus is set forth in the 1967 budget document on page 527, fund #730, Code 5714 * * *. I believe that it is necessary to go behind the budget and refer to the Parking Facility ordinance which authorized the parking facilities—City Council Journal, page 3158, September 18, 1952 which provides (Section 507, Fourth):

"The amount accumulated in the Surplus Revenue Account in any fiscal year shall be transferred to the General Corporate Fund annually and may be appropriated by the City Council for any of the following purposes:

1. Not to exceed 20% of the amount accumulated in the Surplus Revenue Account in any fiscal year to the Police Department for traffic regulation.

2. To extend, improve existing parking facilities or complete those under construction.

3. To acquire, lease or construct additional parking facilities and the payment of all expenses incidental thereto.

4. For surveys, reports, plans and specifications for parking facilities.

5. To provide a depreciation fund for existing parking facilities.

6. For purchases by the City of Parking Facility Revenue Bonds at public or private sale. (Bonds so purchased shall be cancelled and not reissued.)

7. For redemption by the City of Parking Facility Revenue Bonds as provided by ordinance.

8. All costs incidental to refunding of any bonds."

In our opinion no amount accumulated in the Surplus Revenue Account in any fiscal year, is authorized to be transferred to the General Corporate Fund of the City annually, and may be appropriated by the City Council for any purposes whatsoever, other than those purposes enumerated in the above quotation from Section 507 of the Chicago Parking Facility Revenue Bond Ordinance (C.J. September 18, 1952, p. 3158), and that the purpose of paying expenditures to be incurred for certain decorating, reconditioning costs and improvements to the premises located at 54 W. Hubbard Street, at an estimated cost of $50,000 for occupancy by the Bureau of Parking does not come within the purposes therein stated.

It is our further opinion that the use of any amount accumulated, or surplus, in the Surplus Revenue Account is not justified within any of the objects or purposes enumerated in the 1967 Budget Document or Annual Appropriation Ordinance for 1967, on page 527, Fund #730, Code *5714.* * * ".

It is our further opinion that the purposes of "decorating, reconditioning costs and improvements" to real property are not specifically appropriated for in said Fund #730, on page 526 of said document.

The definition of "cost of maintenance and operation" or "maintenance and operation expenses", appearing in Section 1.01(s), among other things, includes the following: "administrative management, legal or overhead expenses of the various City departments as appropriated by the City Council"; "alterations, modifications and additions to revenue collection facilities and similar equipment and supplies used in connection with the actual operation of the parking facilities"; "all fees and expenses incurred in compliance with the provisions of this Ordinance"; "together with all other expenses, whether similar or dissimilar, which, under good accounting practice, are properly chargeable to operation and maintenance of the parking facilities"; "and all other costs and expenses of upkeep which are not included within the definition of 'capital additions' as set forth in subparagraph (t) of Section 1.01 of this Article I."

"Capital additions" is thus defined:

"(t) "Capital additions" and also the term "capital additions and betterments" mean all new and additional parking facilities acquired, purchased, constructed or completed, which under good accounting practice are properly chargeable to Capital Expenditures rather than to Maintenance or Operation, including all parking facilities acquired from the proceeds of Bonds issued hereunder."

"Reconstruction, alteration, repair or redesign of existing" buildings is provided for in Section 1.01 as follows:

> "(u) "Acquired", "Constructed" or "Completed" or words of similar import mean and include * * * the original construction or reconstruction, alteration, repair or redesign of existing or new structures, buildings, places, sites, or property of any kind, nature or description for parking facilities, or the completion of any such facilities."

In our opinion "decorating, reconditioning costs and improvements" of the premises located at 54 W. Hubbard Street are not included within the above provisions for "reconstruction, alteration, repair or redesign of existing * * * buildings", in that said premises do not constitute "parking facilities" as defined in Section 1.01(n) of the Ordinance, nor is the Bureau of Parking a "parking facility".

In our opinion "under good accounting practice" such costs would constitute "capital expenditures" and not "operating expenses." In *People ex rel. Schlaeger* v. *Reilly Tar & Chemical Corp.*, 389 Ill. 434 (1945), Committees' "operating expense" within appropriation and tax levy ordinances, as regards itemization requirements, would include clerical salaries, travel, and purchase of supplies and printing, but the purchase of typewriters, desks, chairs, or other equipment, would constitute "capital expenditures" and not "operating expense". Also, in *Siegel* v. *City of Belleville,* 349 Ill. 240 (1932), a fire engine costing $13,000, was held not "an ordinary current expense" and could not be purchased under an ordinance appropriating $34,000 for the fire department without further specification. In *Application of Port Authority* v. *Trans-Hudson Corp.*, 48 Misc. 2d 485, 265 N.Y.Supp. 2d 925, 949, in a statute prescribing the procedure whereby the Port of New York Authority may exercise eminent domain, the word "improvement" was held to relate to and mean anything in the nature of a structure built on previously vacant land; it did not embrace a rehabilitation of an existing structure.

Alterations or additions to premises which are of a structural or substantial nature are ordinarily the liability of a landlord and not of the tenant, *Kaufman* v. *Shoe Corporation of America,* 24 Ill. App. 2d 431, 435 (1960); *Leavitt* v. *Kostel,* 32 Ill. App. 2d 313, 317 (1961); *Koenigshofer* v. *Shumate,* 68 Ill. App. 2d 474, 477 (1966).

Section 8-1-6 of the Illinois Municipal Code (Ill. Rev. Stat. 1966, Ch. 24, par. 8-1-6 provides in part as follows:

> "Neither the corporate authorities nor any department or officer of any municipality shall add to the municipal expenditures in any fiscal year anything over and above the amount provided for in the annual appropriation ordinance of that year. No expenditure for an improvement to be paid for out of the general fund of the municipality shall exceed in any fiscal year the amount provided for that improvement in the annual appropriation ordinance."

This provision is mandatory. *Simpson* v. *City of Highwood,* 372 Ill. 212 (1939); *People* v. *Sergel,* 269 Ill. 619 (1915).

Section 8-1-7 of the Illinois Municipal Code (Ill. Rev. Stat. 1966, Ch. 24, par. 8-1-7) provides in part as follows:

> "No contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, unless an appropriation has been previously made concerning that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality, and no money belonging thereto shall be paid on account thereof. * * *"

This provision is a limitation upon the power of the City Council to enter into a contract. *Avery* v. *City of Chicago,* 345 Ill. 640, 651 (1931); *May* v. *City of*

Chicago, 124 Ill. App. 527, 533, Affirmed 222 Ill. 595, 599 (1906); *Collins* v. *Village of Glen Ellyn,* 21 Ill. App. 2d 373, 379 (1959); *Mosiman Plumbing Co.,* v. *Village of Pocahontas,* 199 Ill. App. 211, 214 (1916); *Greene* v. *City of Danville,* 350 Ill. App. 440, 443 (1953).

In *People ex rel. Chicago Title and Trust Co.* v. *Village of Glencoe,* 372 Ill. 280, 284-286 (1939), the court said, at page 285:

> "It is claimed by appellants that this money is reserved for depreciation and replacement of the plant. The appropriation ordinances for the years 1935-36-37 do not disclose any appropriation of moneys in the garbage fund for depreciation and replacement, but on the contrary they only appropriate money for annual expenses, which are set forth in detail, and which do not include the purposes above mentioned."

An appropriation, with respect to the premises at 54 W. Hubbard Street, by the City of Chicago, for "alteration and rehabilitation of the Old Criminal Court Building, including equipment and furnishings" was held objectionable on the ground that it did not definitely show the object of the appropriation. *People ex rel. Toman* v. *Advance Heating Co.,* 376 Ill. 158 (1941).

The objects and purposes for which appropriations shall be made are classified and standardized by the items enumerated and defined in Sections 8-2-4 and 8-2-5 of the Illinois Municipal Code Ill. Rev. Stat. 1966, Ch. 24, pars. 8-2-4 and 8-2-5).

The Parking Revenue Fund, #730, page 526 of the Annual Appropriation Ordinance for 1967, in compliance with Sections 8-2-4 and 8-2-5, appropriates for "Personal Services", "Contractual Services", "Travel", "Commodities", "Equipment" and "Contingencies", but it does not appropriate for Item (6) "Permanent improvements", except in Code *5714 "For Parking Facilities" as set forth on page 827.

It is our opinion that expenditures for the contemplated "decorating, reconditioning costs and improvements" of the premises at 54 W. Hubbard Street cannot be paid from such specified items on page 526 of the Annual Appropriation Ordinance of 1967, except under "Code *5710.155 Rental of Property." In view of the fact that the Bureau of Parking has been paying rent for its rented quarters on Wacker Drive, it is our opinion that a charge for rental for its occupancy of the premises at 54 W. Hubbard Street can be justified under the appropriation on page 526 of said document entitled "Code *5710.155 Rental of Property.... $31,600.00", provided there are adequate funds in said account.

In light of our opinion that capital expenditures for substantial alterations or structural changes in the premises at 54 W. Hubbard Street is a proper object to be appropriated for under the Illinois Municipal Code, other available funds not otherwise appropriated may be used for such object.

Any transfer of appropriations to pay any part of the contemplated expenditure should be made in compliance with the requirements of Section 8-2-7 of the Illinois Municipal Code (Ill. Rev. Stat. 1966, Ch. 24, par. 8-2-7). In doing so, it must be kept in mind that municipal officers have no authority to "divert" monies from one fund to another for which it was not appropriated, but may only temporarily borrow such monies subject to reimbursement. *Gates* v. *Sweitzer,* 347 Ill. 353, 79 A.L.R. 1151 (1912); *People ex rel. Schlaeger* v. *Brand,* 389 Ill. 298, 308 (1945).

The Parking Facilities Bond Ordinance provides that it shall constitute a contract between the City and the bond holders (Section 1.05). The form of the bonds in the Ordinance has a similar provision. The Ordinance also provides that all funds in each of the accounts provided therein shall be held in trust by the City and shall be applied, used and withdrawn only for the purposes therein authorized (Sections 5.05, 5.07 and 6.01). It also provides that it is the intent of the parties that the statutory provisions relating to appropriations be complied with (Section 7.03). It further provides for rights of bond holders to enforce by action, by suit at law or in equity, the covenants and agreements in the Ordinance, including the enforcing of an express trust against the City (Section 8.07).

Moneys received by the Chicago Park District from the sale of its bonds were held to be in the nature of a trust fund and could only be used for the purpose for which the bonds were issued and sold to the general public, and the transfer of such funds from the construction fund to the maintenance fund was held unauthorized as was the payment of such funds to pay a bond house fee to secure legislation validating the bond issue. *Chicago Park District* v. *Herczel & Co.,* 298 Ill. App. 215, 228, affirmed 373 Ill. 325 (1939).

Similarly, moneys in the Construction Fund under the Chicago-O'Hare International Airport Revenue Bond Ordinance were held subject to a lien and trust in favor of the holders of the bonds issued and outstanding under the Ordinance as a further security to such holders until paid out or transferred as provided in the Ordinance. *Schick-Johnson Co.* v. *Malan Construction Corp.,* 49 Ill. App. 2d 277, 280 (1964). To the same effect, relative to the Transit Fund under Chicago Comprehensive Traction Ordinance of 1930, see, *People* v. *City of Chicago,* 349 Ill. 304, 344 et seq. (1932).

Ordinances similar to the Chicago Parking Facility Bond Ordinance, adopted under the same Parking Act (Ill. Rev. Stat. 1966, Ch. 24, pars. 11-71-1 to 11-71-11, inclusive), have been held valid in *Poole* v. *City of Kankakee,* 406 Ill. 521, 535-536 (1950); and *Cherry* v. *City of Rock Island,* 8 Ill. 2d 97, 102 (1956).

The discretion of a city council in providing for the pledging of net revenues to retire the bonds and for the transferring of surplus funds to the general purpose corporate fund was approved in the *Poole case* (at p. 535-536); and the discretion of a city council pledging the net revenue from all existing and to be acquired parking facilities to pay the bonds and in providing that it would not sell nor encumber its parking system until the bonds were paid in full, except as provided in the ordinance, was upheld in the *Cherry case.*

Section 11-71-5 of the Parking Act provides "for the transfer of any surplus amounts annually to the general corporate fund of any such municipality only when and in the manner permitted and authorized in accordance with the covenants and provisions and terms of the ordinance authorizing the issuance of any such bonds under the provisions of this Division 71."

In conclusion, it is our opinion that the provisions in Section 5.07 do not authorize the transfer of any accumulated funds in the Surplus Revenue Account to the General Corporate Fund for the payment of "decorating, reconditioning costs and improvements" on the premises at 54 W. Hubbard Street.

POWER OF PENSION FUND TO PURCHASE REAL PROPERTY

(City Comptroller—R. L. C.—April 6, 1972)

You have asked whether the Pension Funds of the City of Chicago have the power to invest their funds in real property.

The type of investments the various Pension Funds may make are set forth in their respective Acts. Section 5-187 of the Policemen's Pension Act list the various securities, bonds and other forms of indebtedness of which the Retirement Board may make investments (Ill. Rev. Stat., 1971, ch. 108½, par. 5-187). Similar provisions are made in the Firemen's Pension Act (Ill. Rev. Stat. 1971, ch. 108½, par. 6-183); The Municipal Employees' Pension Act (Ill. Rev. Stat. 1971, ch. 108½, par. 8-201); and the Laborers' Pension Act (Ill. Rev. Stat. 1971, ch. 108½, par. 11-190).

A study of the respective sections disclose that in none of the Acts is provision made to invest the money in the respective Funds in real estate. The absence of such statutory authority leads to the conclusion that it is prohibited. In *People*

ex rel. Hansen vs. *Collins* (1933), 351 Ill. 551, the Court, in construing an Act giving preference to veterans for civil service appointments and employment by the City of Chicago, said (pp. 555-556):

> "It is a general principle of statutory interpretation that the enumeration of certain things implies the exclusion of all other things. (*United States* v. *Arredondo,* 6 Pet. 691; *Sturges* v. *Collector,* 12 Wall. 19; *Arthur* v. *Cunning,* 91 U.S. 362; *Walla Walla* v. *Walla Walla Water Co.,* 172 id. 1; *Consolidated Coal Co.* v. *Miller,* 236 Ill. 149; *People's Loan and Homestead Ass'n* v. *Keith,* 153 id. 609). If the legislature had intended to give a preference to veterans not only to obtain employment in the civil service, but also to retain it as against all other employees, without regard to their seniority in service, a provision to that effect would have been incorporated in the statute. This omission is indicative of the legislative intention not to confer the preference of retention in employment claimed by the appellant. The judicial department has no power by interpretation to incorporate into a statute a provision which it does not contain. Such a change or addition can be effected only by a legislative enactment."

Other cases to the same effect are *In re Estate of Leichtenberg* (1956), 7 Ill. 2d 545, *People ex rel. Redfern* v. *Penn Central Co.* (1971), 47 Ill. 2d 412, and *People ex rel. Hanrahan* v. *White,* Illinois Supreme Court #44953, Opinion rendered March 30, 1972.

In the Opinions of the Corporation Counsel, Vol. 25, p. 156, it was held that the Policemen's Fund could not invest in Revenue Bonds issued by the University of Illinois and certain other State universities, because of lack of statutory power (Ill. Rev. Stat. 1959, ch. 24, sec. 950). Interestingly, the Policemen's Pension Act was subsequently amended to permit the investment of pension funds in "Revenue Bonds issued by the University of Illinois or any school, department or division thereof, or in any university owned by the State of Illinois, or in any school department or division thereof." (Ill. Rev. Stat. 1971, ch. 108½, par. 5-187(c)). None of the other Pension Acts contain such a provision, although the Municipal Pension Act (sec. 8-201) and the Laborers' Pension Act (sec. 11-190) do provide for the investment in "Revenue bonds issued by any county, city, village, incorporated town or political subdivision in this State, having a population of 2,500 inhabitants according to the latest official census of the United States Census Bureau * * *."

In light of the foregoing, I am of the opinion that the Policemen's Pension Fund, the Firemen's Pension Fund, the Municipal Employees' Pension Fund or the Laborers' Pension Fund do not have the statutory power to use their funds for the purchase of real estate.

SECURITY AGREEMENTS WITH DEPOSITORIES OF CITY FUNDS

(City Treasurer—S. R. D.—March 5, 1968)

We acknowledge receipt of your recent communication attaching a xerox copy of a security agreement between the Continental Illinois National Bank and Trust Company of Chicago and accepted by you as Treasurer of the City of Chicago. The agreement pertains to certain securities placed with the Federal Reserve Bank of Chicago as collateral for City funds on deposit with the Continental Illinois National Bank and Trust Company of Chicago.

You request an opinion as to whether a similar agreement should be obtained from each of the other depositories of City funds.

It is our opinion that it would be advisable to obtain from each depository of City funds an agreement similar to that of the Continental Illinois National Bank and Trust Company of Chicago.

USE OF TRANSPORTATION BOND FUNDS FOR RAPID TRANSIT CARS

(City Comptroller—S. R. D.—May 21, 1970)

We acknowledge receipt of your recent communication in which you state that "under the terms of a Federal Grant Agreement covering the purchase of rapid transit cars for the Dan Ryan and Kennedy Rapid Transit Systems, the City is required to pay ⅓rd of $19,500,000.00 and the Federal Government ⅔rds." You further state that "there exists a deficiency of $1,900,000.00 due to our failure to transfer into this fund the full amount of the City share of the grant."

You further state that "there are net cash balances in excess of encumberances in the following funds.

Fund	Fund No.	Amount
Subway Bond Fund—1952	472	$ 500,810
Superhighway Bond Fund—1947	474	101,867
Superhighway Bond Fund—1952	476	745,373
Public Transportation Bond Fund—1966	480	1,082,634

You ask our opinion as to whether "the purposes of these four bond funds can be construed to permit their use in payment of the rapid transit cars, looking at the superhighway system and transportation issues as a part of a broad project to facilitate transportation of individuals."

The ordinance approving and providing for the execution of Urban Mass Transportation Capital Grant Contract No. Ill. UTG-5, between the City of Chicago and the United States of America (C.J. 12/6/68, pp. 3994-3995), for the financing of the purchase of 150 modern rapid transit cars, provides in part as follows:

> "The City of Chicago will pay the remaining portion of the total project cost of approximately $19,500,000.00 from the Public Transportation Bond Fund 1966-480;"

The proposition submitted to the voters for the issuance of $28,000,000 Public Transportation Bonds states the purpose of such bond issue to be as follows (C.J. 5/6/66, p. 6746):

"[F] or the purpose of paying the cost of constructing and improving facilities in the City's comprehensive superhighway, expressway and street system for transporting passengers by bus or rail, including the construction and improvement of necessary terminal facilities therefor***."

Since the purpose for the issuance of the Public Transportation Bonds included the cost of constructing and improving the City's Comprehensive Superhighway, Expressway and Street System for transporting passengers by bus or rail; and since the contract with the Government for the purchase of the 150 modern rapid transit cars specifically provides that the City's portion of the Project costs shall be paid from the Public Transportation Bond Fund 1966-480, we are of the opinion that the $1,082,634 in the fund may be used in payment of the 150 modern rapid transit cars for use on "the Dan Ryan and Kennedy Rapid Transit lines."

The proposition for the issuance of $42,000,000 Superhighway Bonds (C.J. 4/8/46, p. 5619-20) states the purpose for the issuance of said bonds as follows:

> "[F]or the purpose of constructing superhighways and appurtenances thereto in the City of Chicago and for the acquisition of right-of-way necessary therefor****."

Since the construction of "superhighways and appurtenances thereto" would include the purchase of rapid transit cars, we are of the opinion that the $101,867 in the Superhighway Bond Fund 1947-474 may be used in payment of the 150 modern rapid transit cars provided for in the contract with the Government (C.J. 12/6/68, p. 3994-3995).

The purpose for the issuance of $25,000,000 Subway Bonds is stated as follows (C.J. 4/16/52, p. 2190:)

> "[F]or the purpose of constructing the West Side Extension of the Initial System of Subways,****."

The West side extension of the subway, with the use of the Eisenhower Expressway Median Strip for the transportation of passengers by rail, is an integral part of the "City's comprehensive Superhighway, Expressway and Street System" for the transportation of passengers by bus or rail and therefore, we are of the opinion that the $500,810 remaining in the Subway Bond Fund 1952-472 may be used in payment of the 150 modern rapid transit cars provided for in the contract with the Government (C.J. 12/6/68, pp. 3994-3995).

The purpose for the issuance of $15,000,000 Superhighway Bonds is stated as follows (C.J. 4/16/52, p. 2191:

> "[F]or the purpose of constructing a portion of the Southwest Route and a portion of the South Route of the Comprehensive Superhighway System, including the acquisition of rights-of-way necessary therefor,***."

Since the ordinance for the issuance of the $15,000,000 Superhighway Bonds of 1952 provides that the money may be used for the construction of a part of the Comprehensive Superhighway System, the sum of $745,373 remaining in the Superhighway Bond Fund 1952-476 may, in our opinion, be used in payment of the 150 modern rapid transit cars provided for in the contract with the Government (C.J. 12/6/68, pp. 3994-3995).

In light of the foregoing we are of the opinion that the remaining cash balances in excess of encumberances in the Superhighway Bond Fund 1947-474, the Subway Bond Fund 1952-472, the Superhighway Bond Fund 1952-476 and the Public Transportation Bond Fund 1966-480 may be used in payment of the 150 modern rapid transit cars provided in the contract with the Government.

USE OF ORDERED PAYMENTS TO CITY

(Commissioner, Department of Public Works—M. M. M.—January 2, 1968)

Please be advised that the City Comptroller has been placing all payments made to the City of Chicago by the Chicago & North Western Railway Company on account of the construction of the Chicago-Halsted Street Bridge and the Kinzie-Orleans Viaduct in a separate escrow account designated as account No. 648.

Please be advised that the City is under no obligation to place these funds in escrow nor are we under any obligation to pay interest on the funds. If you desire to use these funds I suggest that you contact the City Comptroller and suggest that he make proper disbursements from account No. 648.

COUNTERSIGNING OF WARRANTS BY COMPTROLLER

(City Comptroller—R. L. C.—December 27, 1972)

You have recently asked this office to review the question concerning the legality of the comptroller's countersigning warrants in excess of the amounts available in the fund against which it is drawn. A subsidiary question also arises as to the criminal and civil liability which may attach to the comptroller's issuing of such warrants.

This letter, in answering these questions, applies to ordinary warrants for payment, as distinguished from tax anticipation warrants. The answer also presumes the issuance to be in all other respects proper, such as for a proper and authorized municipal purpose, against the proper municipal fund, and against a fund and in amount authorized by an appropriation ordinance. *Inter-Ocean Newspaper Co.* v. *City of West Hammond,* 189 Ill. App. 110 (1914).

Section 8-1-8 of the Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 8-1-8) requires warrants to be countersigned by the "municipal clerk, or the city comptroller." Further, section 8-1-9 of the Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 8-1-9) provides:

> "No warrant payable on demand shall be drawn upon the municipal treasurer or against any fund in his possession unless at the time of the drawing there is sufficient money in the appropriate fund in the municipal treasury to pay the warrant."

Research indicates that the language of section 8-1-9 is directory, not mandatory. The statute suggests a procedure to follow in the issuance of warrants, but it is a procedure that may be departed from, if necessary, in certain limited circumstances.

Two Illinois cases have held that if there is *no* money in a fund, warrants may not be issued. In *Wittbold* v. *City of Chicago Heights,* 371 Ill. 94 (1939), the plaintiff sued for the value of unpaid warrants it held. The court held that the holder could not recover unless it could prove "there was on hand in the appropriate funds when and against which the warrants were drawn, money to pay the same." 371 Ill. at p. 97.

In *People ex rel. Western News Co.* v. *City of Chicago,* 292 Ill. App. 186 (1937), the plaintiff held a judgment against the City and sued to compel the issuance of a warrant to pay the judgment. Although the City had passed an appropriation and a taxing ordinance providing a fund from which to pay judgments such as that held by the plaintiff, and although tax collection had been initiated, the court refused to order the City to issue a warrant to pay the judgment. The court noted that the tax would not be collected until some time in the future. Since there was no money in the fund against which a warrant might be issued, nor would there be money available in the near future, the court held that a warrant could not be issued.

The teaching of these two cases is that if it appears a warrant cannot be paid from the proper fund when presented—either because of total absence of money in the fund or because money has not yet been collected for the fund—it would be improper for the comptroller to authorize its issuance.

These depression-era cases do not offer guidance to what is perhaps a more contemporary problem, whether warrants may be issued at a time when, although there is presently insufficient money in a fund to pay them (and other, previously issued warrants), it is apparent that money will be available to pay them at the time they are presented. A literal reading of section 8-1-9, of course, would seem to prohibit issuance of warrants "unless at the time of the drawing there is sufficient funds." However, courts have interpreted analogous criminal statutes as permitting drawing of checks at the time when an account is insufficient, providing there is a reasonable expectation that the check will be paid when the check is presented for payment. The rationale of the criminal worthless check statutes applies equally well to warrants, which are in many respects the same as checks.

The Illinois worthless check statute makes "[f]ailure to have sufficient funds . . . with the depository when the check or other order is issued" *prima facie* evidence of the crime of deceptive practices. Criminal Code of 1961, Section 17-1(d) (Ill. Rev. Stat. 1971, ch. 38, par. 17-1(d)). However, regardless of the state of his account when writing a check, a person may not be convicted under this statute if at the time of issuance he had a reasonable expectation that the check would be paid. *First National Bank of Decatur* v. *Ins. Co. of North America,* 424 F.2d 312 (7th Cir., 1970), *cert. denied* 398 U.S. 939. See also,

Annotation, "Reasonable Expectation of Payment as Affecting Offenses under 'Worthless Check' Statutes," 9 A.L.R. 3d 719. Thus, the comptroller would incur no liability in issuing a warrant against a fund with insufficient money if he knew that money would be available in the fund at the time the warrant was to be presented. For instance, warrants might be issued when the comptroller knows that in the normal course, funds will be available through the sale of tax anticipation warrants, the collection of taxes, or the like. It should be noted, however, that a "reasonable expectation" is more than a mere belief or a hope.

There is a difference between checks and warrants which serves to limit the comptroller's liability in the issuance of warrants. Warrants do not create a debt, while checks often do so when they are given as an inducement to supply goods or services. The Illinois Supreme Court has stated that:

> . . . "[T]he issuance of a warrant to meet the operating expenses of a city [does not] create a debt. It is but an order on the treasurer for the payment of an existing obligation. Appropriations and levies are made for the purpose of paying and not creating obligations." *Wittbold & Co.* v. *City of Chicago Heights.* 371 Ill. 94, 97 (1939).

Thus, an obligation is not created by the issuance of a warrant, but only by the City Council or a department head in ordering or contracting for goods or services. This has significance for the criminal liability in issuing warrants that cannot be paid. The comptroller does not face the possibility of prosecution under the worthless check statute (section 17-1(d) of the Criminal Code), for the payee gives up nothing of value in return for the warrant. Section 17-1(d) is violated only if a check is issued "with intent to obtain control over property or to pay for property, labor or services of another" and with intent to defraud. Since a warrant is merely an order issued from one municipal officer to another, requesting payment be made, the goods or services were furnished not in return for a warrant, but on the Council or department's promise to pay.

In addition, warrants issued without sufficient money in the fund for their payment are void and unenforceable, *Wittbold* v. *City of Chicago Heights,* 371 Ill. 94 (1939). Issuing a warrant does not eliminate the underlying obligation of the Council or department. *People ex rel. Western News Co.* v. *Chicago,* 292 Ill. App. 186 (1937).

Issuance of warrants with the knowledge they will not be paid, is of course, a violation of section 8-1-9. And while such issuance may not violate the criminal worthless check statute, it would constitute official misconduct, a violation of section 33-3 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 33-3):

> "A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:
>
> (a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or
>
> (b) Knowingly performs an act which he knows he is forbidden by law to perform;"

It is highly unlikely that the comptroller would incur any personal civil liability for issuing warrants uncollectible at presentment, if they are not paid by the treasurer. First, as noted, the underlying obligation remains; the issuance of a warrant does not create a debt. Second, warrants issued without funds for paying them are unenforceable, *Wittbold & Co.* v. *City of Chicago Heights, supra.* The payee and his assignees are regarded as having a duty to determine whether warrants they hold are legally issued; they take subject to all defenses, including improper issuance, *Nashville* v. *Ray,* 19 Wall (86 U.S.) 468, 478 (1874); *Inter-Ocean Newspaper Co.* v. *City of West Hammond,* 189 Ill. App. 110 (1914); McQuillan, Municipal Corporations § 42.03.

However, there is potential personal civil liability if the comptroller issues unauthorized warrants *and* the treasurer pays them upon presentment.

If there be any collateral questions which are not answered herein, do not hesitate to ask.

TAX ANTICIPATION WARRANTS

(City Comptroller—S. R. D.—December 3, 1970)

We acknowledge receipt of your recent communication requesting our opinion as to whether approximately $10,000,000 of 1970 Tax Anticipation Warrants may be sold to the City's Motor Fuel Tax Fund.

Section 1 of the Investment of Municipal Funds Act (Ill. Rev. Stat., 1969, Chap. 146½, par. 3.1) provides, in part, as follows:

> "Every . . . municipal corporation, holding in its treasury funds which are set aside for use for particular purposes, including any funds that are disbursed to a county or municipality as to their share of the taxes collected under 'Motor Fuel Tax Law', but which are not immediately necessary for such purposes, by ordinance, any use those funds or any of them, in the purchase of tax anticipation warrants issued by the . . . municipal corporation possessing the funds against taxes levied by . . . municipal corporation. These warrants shall bear interest not to exceed four per cent annually."

We, therefore, are of the opinion that approximately $10,000,000 of 1970 Tax Anticipation Warrants may be sold to the City's Motor Fuel Tax Fund, subject to passage of an ordinance to that effect by the City Council.

WATER SUSPENSE ACCOUNTS—UNCOLLECTIBILITY

(Commissioner of Water & Sewers—W. M. Z.—December 18, 1969)

Please refer to your communication of December 9, 1969 with reference to the above matter, which reads as follows:

> "Section 8.1-11 of the Municipal Code provides that:
>
> 'The commissioner of water and sewers shall cause to be opened in the general ledger of the Bureau of Water two accounts, to be known as the suspense accounts number 1 and number 2. In suspense account number 1 shall be shown the totals of all of the accounts and items which may be ordered transferred under any section relating to frontage rates accounts; and in suspense account number 2 shall be shown the totals of all the items which may be ordered transferred under any section relating to meter rates accounts.
>
> 'The commissioner of water and sewers shall provide suitable detailed ledgers, in which the detailed accounts of suspense accounts number 1 and number 2 shall be kept and shown. All accounts affected by order of court and recommendations of the corporation counsel shall come within the scope of this section. (Passed Coun. J. 11-10-52, p. 3412.)'
>
> "During the year of 1964 a total of $4,210.03 was accumulated in suspense account number 1, and $9,553.36 was accumulated in suspense account Number 2, making a grand total of $13,763.39 in the two accounts for the period involved.
>
> "The Superintendent of Water Collections has in every way available to him made diligent and repeated efforts to collect these delinquent water charges in accordance with the amounts shown in these two suspense accounts during the above period.
>
> "We would appreciate it very much if you would advise us of your opinion on this matter so that we may dispose of these delinquent charges."

An examination of the records kept by your department and the records of your accounts forwarded to our department for collection, indicate that every effort has been made to collect the water suspense accounts for the year 1964.

It is our opinion that these accounts are uncollectible and under modern accounting methods should no longer be carried on your records as a valuable asset. You, no doubt, are aware that the statute of limitation on open accounts is five (5) years. Therefore, it is our opinion that the items in suspense accounts number 1 and number 2, for the year 1964, are uncollectible and should be stricken from your records.

Section C. JUDGMENTS AND CLAIMS

GARNISHMENT PROCEEDINGS AGAINST CITY

(Superintendent, House of Correction—M. C. H.—August 7, 1967)

This is to acknowledge the receipt of your letter to this office in which inquiry is made whether or not you should honor an attorney's lien on money in your possession belonging to Leroy Buckner, an inmate.

Please be advised that the Courts have held that the City of Chicago is not subject to actions at law or in equity involving garnishment proceedings under the Illinois statutes, and in so holding, the courts have taken the position that to subject the City of Chicago to such actions or suits is against public policy of the State of Illinois, *Mervin* vs. *City of Chicago,* 45 Ill. 133, 92 A.D. 204 1867). See, also *Badenoch* vs. *City of Chicago* 222 Ill. 71.

Likewise, a creditor's suit will not lie against the City of Chicago to enable the complainant creditor of an official or employee of the City to reach a debt owing by the City to a debtor or official or employee of the City, *Smith* vs. *Woolsey,* 22 Ill. App. 135; *Lamb vs. Lamb* 256 Ill. App. 226, 227; *Quitsow* vs. *Hennessey,* 338 Ill. App. 176.

In view of the above, it is our opinion that the attorney's lien against the funds of inmate Leroy Buckner should not be honored.

COLLECTION OF PAST DUE INSPECTION FEES

(City Comptroller—S. R. D.—December 13, 1967)

We are in receipt of your recent communication relative to the innovation of a more efficient and workable concept as to procedural measures and followup between your office and the Law Department, with the ultimate aim of effecting collection of past due warrants, with the minimum complexity of record keeping, time expended and expense involved.

You ask whether a suit may be filed joining as defendants many individuals owing the same type of past due inspection fee. You state this procedure, if permissible, would be advisable because the individual amounts of the bills vary from three dollars upward, which would make the filing of individual law suits impracticable. You also ask if court costs and other fees can be added to the amounts of the bills when the City receives a favorable court decision.

We will first turn our attention to the basic question of whether the City can join in one suit as defendants, numerous individuals owing the same type of past

due inspection fee. Section 24 of the Civil Practice Act (Ill. Rev. Stat. 1965, chap. 110, par. 24) pertains to who may be joined as defendants in the same action and provides, in part, as follows:

> "(1) Any person may be made a defendant who, either jointly, severally or in the alternative is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction or series of transactions out of which the controversy arose, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein, or against whom a liability is asserted either jointly, severally or in the alternative arising out of the same transaction or series of transactions, regardless of the number or causes of action joined.
>
> "(2) It is not necessary that each defendant be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make any order that may be just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

The courts have, on numerous occasions, construed Section 24. In *The City of Nokomis v. Sullivan* (1958), 14 Ill. 2d 417, the City of Nokomis joined twenty-nine owners or tenants of property for failure to connect with the sewerage system of the city, contrary to the provisions of a city ordinance. The defendants moved to strike the complaint on the grounds that the joinder of defendants was improper and that the ordinance was invalid. The court, in construing Section 24 of the Civil Practice Act, said (p. 420):

> "Those parties may be joined 'against whom a liability is asserted either jointly, severally or in the alternative arising out of the same transaction or series of transactions, regardless of the number of causes of action joined.' It is not necessary that each defendant be interested in all the relief requested. As in the case of joinder of plaintiffs, the objective is 'economy of actions and trial convenience.' (McCaskill, Ill. Civ. Prac. Act. Ann., sec. 24,) and the determining factors are that the claims arise out of closely related 'transactions' and that there is in the case a significant question of law or fact that is common to the parties. (See *Johnson* v. *Moon*, 3 Ill. 2d 561.) In the present case the dominant question is one of law, the validity of the ordinance, and it is common to all parties. If any genuine issues remain after that common question has been decided, they can be readily handled, without inconvenience or prejudice to the parties, in a single action."

In *Dorsey* v. *Material Service Corp.* (1956), 9 Ill. App. 2d 428, the court permitted fifty-five plaintiffs to bring suit against four defendants to enjoin them from continuing the excessive and unreasonable use of explosives in the operation of their quarries. In the companion case of *Opal* v. *Material Service Corp.*, 9 Ill. App. 2d 433, the court, after an extensive review of the law throughout the country concluded that numerous plaintiffs could be joined in the same action. In discussing the procedural problems that may arise by the joinder of numerous parties in the same action the court said (p. 444):

> "Both sections 23 and 24 confer upon the trial court discretion to order separate trials and otherwise to protect the parties from injustice or unnecessary expense. Misjoinder does not carry with it the penalties attached to it by the common law, for section 26 provides: 'No action shall be defeated by non-joinder or mis-joinder of parties,' and Illinois courts have generally followed the rule that dismissal of the complaint for misjoinder of parties or claims is improper. *Hitchcock* v. *Reynolds*, 278 Ill. App. 559; *People* v. *Shetler*, 318 Ill. App. 279; *People for Use of Jones* v. *Leviton*, 327 Ill. App. 309."

And, again the court said (pp. 449-450):

> "Of the course the joinder of multiple claims or multiple parties increases the procedural problems of the trial judge. Under the statute he has broad discretion to provide for separate trials and to control the course of litigation. He must consider the questions of trial convenience and of minimal

hardship to the parties—always in subordination to the search for the most equitable solution but in connection therewith. A case such as *Baker* v. *S. A. Healy Co.*, [302 Ill. App. 634 where sixty-two plaintiffs were permitted to bring claims against the contractor, the Sanitary District and the City of Chicago for damages caused by a series of explosions in the course of constructing a sewer] which involves numerous plaintiffs and difficult factual questions as to damages, presents the interesting question whether the court should or could permit one jury to pass on the liability of defendants and one or more different juries to assess the damages of the various plaintiffs. A procedure, assuming that it could be legally employed, of allowing separate trials for different issues, might in some instances afford a more orderly and logical introduction of evidence, with the submission of fewer and simpler questions to the jury, and might also encourage claimants to settle out of court, if liability is established. So far as we know it has not been decided in this state whether the trial judge may set damage questions down for separate trial, but dicta in *Schultz* v. *Gilbert*, 300 Ill. App. 417 (in the Fourth District), and *Baker* v. *S. A. Healy Co.* strongly suggest that appellate courts consider that orders for separate trials of separate issues are within the discretion of the trial court."

In *Ras* v. *Allan Anthony Elec. Corp.* (1965), 55 Ill. App. 2d 176, the court permitted the plaintiffs to join three separate defendants in the same action, saying (p. 181):

"We find the cases last cited more persuasive and more in line with our Civil Practice Act which permits the joinder of various causes of action in one complaint. Ill. Rev. Stats. (1963), c 110. This Act (the provisions of which were applicable to county court actions: c 110, § 1, c 37, § 284) expresses a legislative intent to encourage the joinder of claims and thereby avoid multiplicity of lawsuits, promote trial convenience and conserve time, manpower and litigants' costs. Section 24 of the Act concerns the joinder of defendants and provides that any person may be made defendant who is alleged to have an interest in any part of the controversy or against whom a liability is asserted either jointly or severally arising out of the same transaction or series of transactions, regardless of the number of causes of action joined. It is not necessary that each defendant be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him."

In *Schwartz* v. *Swan* (1965), 63 Ill. App. 2d 148, in a suit for personal injuries, the court permitted the plaintiffs to join as defendants drivers of automobiles having separate accidents with the plaintiffs on separate days, saying (pp. 157-158):

"In our opinion the provisions of the Civil Practice Act, as interpreted in *Johnson* v. *Moon* (supra) authorize the joinder of these defendants, since the complaint clearly asserts a liability arising out of the series of transactions alleged. Unless it can be determined with reasonable certainty to which occurrence plaintiff's [Dorothy Schwartz] alleged injuries are attributable, the nature and severity of plaintiff's injuries, and the extent to which each collision contributed thereto is a common question of fact."

In light of the foregoing, it is our opinion that we would be able to sustain a cause of action, joining as defendants numerous individuals owing the same type of past due inspection fees. There would be the common and dominant question of law as to the applicability of the ordinance assessing the inspection fee, which would be of mutual interest to all the joined defendants. After determining the applicability of the ordinance, the remaining issue would be one of fact relative to the date of inspection, type and location of the inspection, the owner or possessor of the inspected premises, and the amount due under the ordinance for said inspection.

It would be our recommendation that each complaint be limited to delinquent warrants for a specific year and to a specific category of inspection fee, i.e., sign inspection, refrigeration inspection, or boiler inspection. We do not believe it

would be necessary to have a separate count as to each defendant. A blanket allegation could be made to the effect that "The following named persons owe the 19.. boiler inspection fee for the locations and amounts set forth opposite their respective names." Then, the names, addresses and amounts due should be listed. Summons would issue against each defendant. The number of defendants to be joined in each law suit should be limited so that the mechanics of processing and handling the litigation do not become unwieldy.

Prior to return day, many defendants will undoubtedly pay the amounts due; others will default and judgment should be entered against them. As to remaining defendants, the trial court may exercise a broad discretion to provide for separate trials, if necessary, and, generally, to control the course of litigation, including the question of trial convenience to minimize any hardship to the parties (*Opal* v. *Material Service Corp.* (1956), 9 Ill. App. 2d 433, 449).

Relative to your question pertaining to the assessment of court costs and other fees, it is our opinion that these will be nominal and will be assessed by the trial court.

Questions of procedural seps to be taken prior to the filing of suit can best be determined in oral discussions between your staff and Assistant Corporation Counsel Richard J. Elrod, Head of Ordinance Enforcement Division.

CHANGE IN INTEREST RATE PAID ON JUDGMENTS

(City Comptroller—R. L. C.—November 4, 1969)

Your letter of September 10, 1969 takes note of the fact that House Bill 2567 was signed by the Governor on August 29, 1969 and you ask our opinion as to its effect on the payment of interest on judgments entered against the city.

House Bill 2567 amends Chapter 77, Section 7 Illinois Revised Statutes 1967 by striking the interest differential which was previously granted to municipalities by the following language:

> "except that as against any political subdivision or municipal corporation within the state the rate shall be five percent (5%) per annum".

In its amended form the said Section 7 now reads in its entirety as follows:

> "Section 7. Every execution issued upon a judgment shall direct the collection of interest thereon from the date of recovery of the judgment until the same is paid at the rate of 6% per annum".

The effective date of this Act is the date of approval by the Governor—August 29, 1969. In Illinois, Statutes are not to be construed retroactively unless it clearly appears such was the legislative intention (*U.S. Steel Credit Union* v. *Knight,* 32 Ill. 2d 138; *Hogan* v. *Bleeker,* 29 Ill. 2d 181; *Nelson* v. *Miller,* 11 Ill. 2d 378). This Act clearly calls for the prospective application of the higher interest rate which is achieved by striking the prevailing one percent credit to "political subdivisions or municipal corporations".

It is a fact that any delay in payment of judgments by the city is due to the unavailability of funds flowing from the Judgment Tax Levy (which rate is set by Statute) and not upon any wilful reluctance to meet the obligation. It is also a fact that these payments are made in sequence, with interest, without the necessity of execution on the judgment ever being attempted.

In the light of these considerations, it is the opinion of this office that judgments dated prior to August 29, 1969 be paid at a rate of 5% interest regardless of the date of payment and that all judgments entered subsequent to August 29, 1969 be paid at a rate of 6% per annum.

CITY EMPLOYEE'S NEGLIGENT OPERATION OF MOTOR VEHICLE

(Chairman, Committee on Finance—S. R. D.—October 18, 1967)

The above captioned claim has been referred to this office to determine whether the same should be paid. The report from the Fire Department discloses that on July 21, 1967, Firefighter Gaylord Thomas was driving a bus used to transport a group of young people from the Lawndale area in the City of Chicago to Thillen's Little League Stadium for the purpose of witnessing a Fire Department sponsored Championship Baseball Tournament. After the game, the bus driven by Thomas, when in front of 6437 North Kedzie Avenue, Chicago, Illinois scraped the front bumper of a 1961 Chevrolet Sedan owned by Harold Snite, 6427 North Kedzie Avenue, Chicago, Illinois, causing damage approximated at between seventy-five to one hundred dollars.

Although Thomas stated he did not know that an accident had occurred, 2nd Deputy Fire Marshal John R. Leonard, who investigated the accident, stated "that due to the size of the bus, the noise made by driving and the youths inside the bus and the narrowness and darkness of the street at said location, that the bus could have scraped the side against the fender and bumper unbeknown to the driver" and recommends that the claim be paid.

Section 1-4-4 of the Municipal Code 1961 (Ill. Rev. Stat. 1965, chap. 24, par. 1-4-4) provides as follows:

> "In case any injury to the person or property of another is caused by the negligent operation of a motor vehicle by a member of a municipal fire department while the member is engaged in the performance of his duties as fireman, and without the contributory negligence of the injured person or the owner of the injured property * * *, the municipality in whose behalf the member of the municipal fire department is performing his duties as fireman shall be liable for that injury."

In light of the foregoing, we concur in the recommendation of 2nd Deputy Fire Marshal John R. Leonard that the above claim be paid. We are returning your file herewith.

AUTO INSURANCE REQUIREMENTS FOR CITY EMPLOYEES

(Chairman, Committee on Finance—B. M. K.—February, 3, 1969)

In reply to your communication of January 28, 1969 in which you request our opinion concerning the desirability of City employees who use their own car on City business carrying liability insurance, it is our opinion that the employee be required to carry insurance in a minimum amount of $10,000/$20,000 for Personal Injury and $5,000 for Property Damage in order to comply with the technical requirements of the financial responsibility law.

The City is self-insured in these instances and the insurance should be in the name of the car owner as named insured and not the "City of Chicago."

Proof of the insurance should be given the employee's Department Head. It should be no burden on the employee since he should carry this insurance in any event. The policy should not be limited to "non business use" but the higher premium should be paid to cover business use.

RAILROADS' OPERATING PROPERTIES TAX REFUND RESERVE

(City Comptroller—B. Q. O'B.—November 29, 1967)

In answer to your request for an opinion as to the holding by the County Treasurer of Cook County, as ex officio County Collector of taxes, of approximately $17,500,000 representing the City of Chicago's share of real estate and personal property taxes to provide a reserve for refunds to the railroads, arising out of and resulting from tax litigation in the Circuit Court of Cook County, we submit the attached documents which reflect a thorough examination of the official records therein mentioned:

Chart I—Summary of City of Chicago Taxes on Railroads' Operating Properties (Excluding Properties Locally Assessed), as Assessed, Extended, Paid and Refunded, Reflecting Results of Tax Litigation, as shown by County Collector's Railroad Warranty Books and Records, as of November 15, 1967.

Chart II—Abstract of City of Chicago Taxes Assessed, Levied and Extended for Tax Years 1956 to 1966 as shown by County Clerk's Abstract of Taxes Books.

Chart III—Analysis of Taxing Body Account No. 5 Treasurer of City of Chicago—City of Chicago—City Towns, for 1967, From January 1, 1967 to November 13, 1967 (Pages 223-238).

Chart IV—Analysis of Reserve Account No. 5 of County Treasurer in Name of City of Chicago.

Chart V—1965 Taxes Billed, Collected, Uncollected and Net Collections Available for Distribution to City of Chicago as of December 31, 1966.

Chart VI—Recapitulation of Quantity of Items Comprising the 1965 Real Estate Printer's Copy, Tax Judgment, Sale, Redemption and Forfeiture Record and the Notice of Sale, as Compiled by the Department of Central Services.

Chart VII—Recapitulation of 1966 Delinquent Personal Property Items as of Ocober, 1967 from the office of the Department of Central Services of Cook County, Illinois, Records.

Chart VIII—Reserve for Loss and Cost of Tax Collection against Property Taxes Levied, 1957-1967, as of December 31, 1966.

All valuation objections of all railroads for the tax years 1956 to 1962, both inclusive, have been finally adjudicated by the Supreme Court of Illinois and on remand judgments refused have been entered in accordance with the Supreme Court opinion, for a total valuation refund to all railroads held entitled thereto of $8,426,240.85, all of which has been disbursed to the railroads (Chart I, Col. (2)).

Of the total rate refunds ordered for 1956 to 1965 railroad taxes, of $471,897.88 (Chart I, Col. (3)), the sum of $400,820.72 has been distributed to the railroads, and $35,327.21 for 1964 and $35,749.95 for 1965, or a total of $71,077.16, has not yet been distributed to the railroads, and when it is distributed, it will be charged to Reserve Account No. 5 of the County Treasurer with the City of Chicago (Chart IV). There are no valuation objections of any substance in the tax years subsequent to 1962.

Our estimate of the collectibility of 1966 taxes due to the City is reflected in Chart I, as qualified by the data in the other charts.

As shown by Chart IV, the County Treasurer is holding approximately $1,092,900, from general taxes collected (not railroad taxes) as a reserve and he intends to withhold an additional $2,000,000 in 1968 from the City of Chicago general tax collections as a reserve to cover tax rate refunds and contingencies.

We have not listed the specific amounts of the railroad claims by named railroads and by amounts applicable to each year's taxes inasmuch as such information, in our opinion, is not now relevant, all such claims having been finally adjudicated and the valuation refunds ordered having been paid in full.

STOLEN SALARY WARRANTS

(City Treasurer—H. N. L.—July 8, 1971)

This letter is in response to your memorandum of June 23, 1971 which requested an opinion regarding whether the Treasurer's office or the Board of Education should bear the loss of salary warrants which were stolen, the endorsements were forged and subsequently cashed in the Treasurer's office.

A warrant is a draft in which the drawee is a party other than a bank. The term "warrant" is usually used only when referring to governmental institutions. Due to the fact that a warrant has the same legal standing as a check, cases and laws regarding checks are equally applicable to warrants.

The general rule is that a drawee has a duty, by contract, to pay only to the genuine payee or to his order. This is an absolute duty and the loss from any error made in this respect will fall on the drawee.

The Illinois Supreme Court considered this exact question in two cases in 1931. They are *Cosmopolitan State Bank* v. *Lake Shore Trust and Sav. Bank,* 343 Ill. 347 (1931) and *The United States Cold Storage Company* v. *The Central Manufacturing District Bank,* 343 Ill. 503 (1931). In Cosmopolitan the court stated:

> "The rights and liabilities of these parties under the law are not doubtful. The plaintiff [the drawee] was bound to pay the amount of the check of the drawer to the payee or to its order, and to no other person." 343 Ill. at 350.

The court held that the drawee must suffer the loss of a payout pursuant to a forged indorsement.

In the *U.S. Storage* case the court held that:

> "Out of the relation of debtor and creditor existing between banks and their depositors, the law implies the contract on the part of the bank to pay the depositor's checks, to the amount of his deposit, to the persons to whom he orders payment to be made. If the check is made payable to the order of a person named, the duty of the bank is absolute to pay only to the payee or according to his order. No amount of care to avoid error will protect the bank from liability if it pays the check to a wrong person, and it must ascertain and act upon the genuineness of the indorsement at its peril." 343 Ill. at 513.

Here also the court held that the drawee must suffer the loss.

There is only one situation in which the drawee would not have to suffer the loss. This is the situation delineated in the cases of *Kaszab* v. *Greenbaum Sons & Trust Co.,* 252 Ill. App. 107 (1929) and *Osborn* v. *Corn Exch. Nat'l. Bank,* 218 Ill. App. 28 (1920). In those cases drawers had had funds stolen by an employee who forged endorsements on genuine checks over a period of 19 months in the first case and 41 months in the second. In both cases the courts held that the drawer was, or should have been, familiar with the signature of the payees. In our case, this rule would probably not apply because we do not have the forgeries over such a long period of time.

Therefore, the loss from the stolen warrants with forged endorsements would fall on the Treasurer's office rather than the Board of Education.

LIABILITY FOR STOLEN BOARD OF EDUCATION WARRANTS

(City Treasurer—H. N. L.—August 5, 1971)

I am writing you this letter pursuant to my conversation several days ago with Harry Boll, Deputy City Treasurer, regarding the liability of the Treasurer's Office when Board of Education warrants are stolen and cashed with forged endorsements.

Mr. Boll informed me that you, in your capacity as ex-officio School Treasurer, keep funds of the Board of Education segregated from the funds of the City of Chicago. The determination of who must bear the loss when warrants are cashed on forged endorsements would depend on the capacity in which you act when cashing the warrants.

Due to the fact that you are required by statute to be the School Board Treasurer, School Code § 34-74 (Ill. Rev. Stat. 1969, ch. 122, § 32-74), and you have a duty to keep the funds and pay them out pursuant to the warrants of the Board, School Code § 34-75 (Ill. Rev. Stat. 1969, § 34-75), the argument can be made that your act of cashing Board of Education warrants was done in your capacity as Treasurer of the Board of Education. However, it is more logical that you acted in your capacity as City Treasurer because the warrants were drawn on "The Treasurer of the City of Chicago," and were paid as an accommodation for the Board of Education, whose funds you maintain. Therefore, the City of Chicago would be required to suffer the loss of the cashing of the stolen warrants as any depository of funds would. (See letter of July 8, 1971).

LIABILITY OF NEW OWNER FOR DELINQUENT WATER CHARGES

(Chairman, Committee on Finance—P. J. E.—November 2, 1967)

We have your letter of October 25, 1967 requesting an opinion as to whether a new owner is liable for delinquent water charges which had accrued against a former owner and also his right to a refund, after payment, to avoid having the water turned off.

In Case No. 66 Co. T. D. 091 in the Circuit Court of Cook County, Illinois, on July 20, 1966, the Court directed the issuance of a tax deed to the Northwestern Finance Company to extinguish the title of a former owner, and a tax deed was issued on said date.

It appears that subsequent thereto, the purchaser, to avoid having the water turned off for non-payment of the water bill, paid the entire bill, including the portion which had accrued against the former owner and now claims a refund of that portion.

In *Clark* vs. *Zaleski* (253 Ill. 63) the Court held:

> Where a tax lien is foreclosed and a sale is had in pursuance of a valid decree and the purchaser complies with the law in regard to giving notice the proceeding constitutes a new and independent title, free and clear from all previous titles and claims of every kind and character as the statute provides that the taxes on real estate shall be a prior and first lien on such property, superior to all other liens and encumbrances.

In *Rockford Savings and Loan Association* vs. *City of Rockford* (352 Ill. 348) the Court held:

> A charge for use of City water is not a tax, but a matter of contract and cannot be assessed against a subsequent purchaser who has had no notice of the delinquent charge against a former owner, and that the purchaser in this

case who had paid to the City back water rates wrongfully exacted, which payment was made under protest to prevent the City from carrying out its threat to shut off the water supply to the property could recover the amount, with interest, in an action at law against the City.

In view of the above decisions it is our considered opinion that the tax purchaser in this case is only responsible for that portion of the water bill which accrued to the City of Chicago during the period from July 20, 1966, the date of its tax deed, to date, and that it is entitled to recover from the City of Chicago that portion of the bill which had accrued against the former owner which, the purchaser says, it paid to prevent the City from carrying out its threat to shut off the water.

Section D. BONDS

SELLING OF BONDS TO CITY TREASURER BY CITY COMPTROLLER

(City Comptroller—S. R. D.—February 13, 1969)

We acknowledge receipt of your communication requesting our opinion as to whether $1,000,000 of unsold Subway Bonds, dated December 1, 1952 (C.J. 7-2-52, p. 2616) and due January 1, 1970, can be sold to the City Treasurer. You state that it has been a long standing "practice to sell maturing unsold bonds to the City Treasurer on December 31st and the City Treasurer redeems them by charging them against the bond redemption and interest fund on January 1 of the following year."

Section 7-41 of the Municipal Code of Chicago provides, in part, as follows:

"The comptroller and treasurer jointly shall have authority to use any and all funds in the city treasury which are set aside for use for particular purposes and not immediately necessary for such purposes, for the purchase of the following classes of securities:

"(a) Interest bearing general obligations of the * * * City of Chicago.

* * *

"All securities so purchased, excepting tax anticipation warrants, shall show on their face that they are fully payable as to principal and interest, if any, within one year from the date of purchase."

In light of the foregoing, we are of the opinion that you may continue your practice of selling maturing unsold bonds to the City Treasurer on December 31 and the City Treasurer may redeem them by charging said bonds against the bond redemption and interest fund on January 1 of the following year. You may, therefore, sell $1,000,000 of the authorized but unsold Subway Bonds, dated December 1, 1952, and showing on their face that they are due January 1, 1970, to the City Treasurer who shall redeem the same on January 1, 1970.

LOSS OF STREET LIGHTING BOND

(City Comptroller—S. R. D.—January 20, 1970)

We acknowledge receipt of your recent communication in which you attach a letter from Hayden, Stone Incorporated dated December 17, 1969, reporting the loss of $5000 face amount of Chicago Electric Street Lighting 3¼% Bonds due January 1, 1970, Series 1956, Bond Nos. 5716 to 5720 at $1,000 each, registered in the name of Mr. J. R. Meehan. You request our opinion as to "whether a regular indemnity bond from Hartford Accident and Indemnity Company will suffice to protect us from loss if we replace the lost bonds."

We are of the opinion that a regular indemnity bond from Hartford Accident and Indemnity Company will be sufficient. We suggest, however, that you notify the paying agents of the loss so that they may make a record thereof.

USE OF MUNICIPAL BUILDING BOND FUND FOR ERECTION OF TERMINAL BUILDING AT MIDWAY

(City Comptroller—S. R. D.—May 6, 1968)

We acknowledge receipt of your recent communication requesting an opinion as to whether money from the 1966 Municipal Building Bonds Fund "may be used for the purpose of erecting the terminal buildings at Midway Airport."

The preamble of the ordinance (C.J. 5-6-66, p. 6745), providing for the submission to the electors and authorization by them of the individual bond propositions, states:

> "Whereas, The present and future needs of the City of Chicago require that a program of public works be prepared and carried out, including the cost of * * *; *acquiring land and erecting and equipping thereon municipal buildings for the Police, Fire, Public Health and other Departments of City Government* * * *" (Emphasis added.)

The caption of the Municipal Building Bonds proposition (C.J. 5-6-66, p. 6746) reads:

> "To Issue $36,000,000 *Municipal Building Bonds For Fire, Police, Public Health And Other Departments of City Government.*" (Emphasis added.)

and the body of the Municipal Building Bonds proposition provides (C.J. 5-6-66, p. 6746):

> "Shall bonds in the amount of $36,000,000 be issued by the City of Chicago *for the purpose of acquiring land, erecting and rehabilitating and equipping public buildings for the Departments of City Government, including the police, fire, public health, public works, house of correction, streets and sanitation departments* . . ." (Emphasis added.)

The ultimate question is whether the Department of Aviation, which manages and controls the Chicago Midway Airport (Municipal Code of Chicago, chapter 8.2; 1968 Annual Appropriation Ordinance, pp. 32, 362), is included in the phrase "and other Departments of City Government" in the preamble and the caption and the phrase "public buildings for the Departments of City Government" in the body of the proposition. The answer requires a determination of the intent of the City Council. The law is clear that the rules of construing an ordinance are the same as those which apply in construing statutes and that the primary object is to ascertain and give effect to the intention of the law-making body, as disclosed by the language used. *Reitman* v. *Village of River Forest* (1956), 9 Ill. 2d 448.

The fact that the preamble of the ordinance and caption of the proposition contain the phrase "and other Departments of City Government" and that the body of the proposition contains the phrase "Public buildings for the Departments of City Government", could raise the presumption that other "Departments of City Government" in addition to the police, fire, public health, public works, house of correction, streets and sanitation departments, are included within the scope of the Municipal Building Bonds proposition.

Further, the word "including" in the body of the proposition and linking the phrases "the Departments of City Government" and "the police, fire, public health, public works, house of correction, streets and sanitation departments" has been legally construed. In *Patteson* v. *City of Peoria* (1943), 318 Ill. App. 245, the question arose as to whether policewomen, police matrons and female clerks

employed in the City of Peoria in the Police Department were included in the following definition:

> "The word 'policeman' means any member of a regularly constituted police department of a city, village or incorporated town, sworn and commissioned to perform police duties, and includes the chief of police, assistant chief of police, chief of detectives, captains, lieutenants, sergeants, plain clothesmen and patrolmen."

The court, after an exhaustive review of the numerous cases defining the words "include" or "including", said (p. 250):

> "An analysis of the cases demonstrates that the issue in each case was not settled by any hard and fast definition of the word used, but by ascertaining and applying the intention of the legislature to the particular state, under the recognized rules of statutory construction, or the intention of the maker of the specific instrument involved."

The court concluded (p. 259):

> "Under the history of the legislation on the subject, and the authorities above mentioned and discussed, our conclusion is that the word 'includes' was meant to be given the same meaning as 'comprises', and that the legislature intended to create a fixed and definite class, excluding all those not specifically named."

In *I.C.R.R. Co.* v. *Franklin County* (1944), 387 Ill. 301, the court, in applying the rule of statutory construction, particularly as it applies to the word "include", reached a different conclusion than the court in the *Patteson* case, saying (pp. 313-314):

> "In support of this position, appellee invokes the familiar *maxim expressio unius est exclusio alterius.* In the interpretation of statutes, the rule embodied in that expression is a sound and well-known rule of construction. It is not a rule of law. It is merely a rule applied to assist in arriving at the real intention of the lawmakers, where such intention is not clearly manifest from the language used. (Sutherland on Statutory Construction, secs. 325, 326.) It may be resorted to only for that purpose. It may not be used to defeat or override the legislative intention expressed. It may not be used to create doubt, but only to remove it. (59 C.J. 943, sec. 563.) It must yield whenever a contrary intention appears. (50 Am. Jur. 241, sec. 246.) It is to be applied with caution and merely as an auxiliary rule to determine the legislative intention. (Beal's Cardinal Rules of Leg. Interp. (3d ed.) 353; Crawford, Statutory Construction, p. 337, sec. 195; Endlich, Interp. of Statutes, pp. 558-559, secs. 398-399.) This maxim is to be applied only when it appears to point to the legislative intent, and never to defeat the plainly indicated purpose of the lawmaking body. (*Swick* v. *Coleman,* 218 Ill. 33) The rule should never be followed to the extent of overriding a definite intent of the legislature. *Consumers Co.* v. *City of Chicago,* 313 Ill. 408; *Public Utilities Com.* v. *Monarch Refrigeration Co.* 267 Ill. 528.
>
> "The word 'include' is sometimes used merely to specify particularly that which belongs to the genus already expressed in more general terms. It is sometimes used to add to the general class a species which does not naturally belong to it. (*Montello Salt Co.* v. *State of Utah,* 221 U.S. 452, 55 L. ed. 810; *United States* v. *Pierce,* 147 Fed. 199.) It may be used to preface an illustrative example of a general power already granted, *Helvering* v. *Morgan's Inc.,* 293 U.S. 121, 79 L. ed. 232, 55 S. Ct. 60, or it may serve to define that power or even enlarge it. Whether it is the one or the other must be determined by the purpose of the act, to be ascertained in the light of the context, the legislative history and the subject to which the statute is to be applied. *Phelps Dodge Corp.* v. *National Labor Relations Bd.* 313 U.S. 177, 85 L. ed. 753, 61 S. Ct. 845, 133 A.L.R. 1217."

The court, in construing that part of Section 58 of the Public Utilities Act (Ill. Rev. Stat. 1967, chap. 111⅔, par. 62), which provides that "the commission shall also have power by its order to require a reconstruction, alteration, relocation or improvement of any crossing (including the necessary highway approaches

thereto) of any railroad across any highway or public highway * * *", said (p. 317):

> "Clearly, this including clause enlarged rather than detracted from that which preceded it. It was obvioiusly inserted in order to make clear the legislative intent that the cost to be apportioned should not only be the cost of the reconstruction, alteration, relocation or improvement of the crossing, but should also include the cost of changes or alterations in the equipment of other public utilities affected, as well as the cost of the relocation, diversion or establishment of any public highway, made necessary by such reconstruction, alteration, education or improvement of such crossing. The fact that the word 'improvement' was omitted from the inclusion clause is wholly insignificant. The inclusion clause related to cost not naturally included in the general expression which preceded it. Its effect was to enlarge that general expression and give to the commission the power to apportion not only the cost of the reconstruction, alteration, relocation or improvement of a highway crossing, but the cost of all changes in the equipment of other utilities, as well as the cost of the relocation, diversion or establishment of any highway, made necessary by such reconstruction, alteration, relocation or improvement of the crossing. Any other construction would render important parts of the section meaningless and be contrary to the whole scheme and purpose of the legislative intent clearly expressed in its comprehensive and all-inclusive provisions."

Likewise, in the Municipal Building Bonds proposition, the phrase "for the Departments of City Government" in relation to the interpretation of the word "including" cannot be ignored. It must be considered along with the rest of the sentence "the police, fire, public health, public works, house of correction, streets and sanitation departments." Furthermore, the preamble and the caption contain the phrase "and other Departments of City Government." These are words of enlargement and expansion, not words of detraction and exclusion.

In *People* v. *Hall* (1965), 55 Ill. App. 2d 255, the court in construing the meaning of the word "including" appearing in Section 111-5 of the Criminal Code (Ill. Rev. Stat. 1967, chap. 38, par. 111-5), said (p. 259):

> "The clear implication of the use of the word 'including' is that it should be read as 'including but not limited to.' This view is borne out by the committee comments on this section when they say: 'Thus, this section is designed to illustrate the defects that are considered formal and to provide for amendment by motion rather than by a return to the grand jury in the cases of indictments'."

Applying the foregoing rules of statutory construction, it is apparent that it was the intention of the City Council and those who voted on the Municipal Building Bonds proposition at the June 14, 1966 election that the word "including" should be construed as "including but not limited to" the specific municipal departments listed. The Municipal Building Bond Funds, therefore, can be used to acquire land, erect, rehabilitate and equip public buildings for the "other Departments of City Government" including the Department of Aviation.

In light of the foregoing, we are of the opinion that the money from the 1966 Municipal Bonds Fund may be used for the purpose of erecting the terminal buildings at Midway Airport, which is managed, supervised and controlled by the Department of Aviation.

USE OF MUNICIPAL BUILDING BOND FUND TO ACQUIRE BUILDINGS

(Comptroller—S. R. D.—October 31, 1967)

We acknowledge receipt of your recent communication in which you state that the Board of Health has requested you to acquire the one-story brick building at 1150 W. 78th Street, Chicago, Illinois, commonly known as the Doctor's Building, for use as an Infant and Maternal Care Clinic.

You state that you desire to charge the cost of acquiring the building to Bond Fund #447, Municipal Building Bonds of 1966. The bond issue for Fire, Police, Public Health and Other Departments, approved by the voters at the Special Election held June 14, 1966, provides, in part, as follows (C.J. 5-6-66, 6746):

> "For the purpose of acquiring land, erecting and rehabilitating and equipping public buildings for the Departments of City Government, including the police, fire, public health, public works, house of correction, streets and sanitation departments."

You request our opinion as to whether the word "land" would include the existing building thereon. The definition of "land", as used in the statutory provision for the annual appropriation ordinance for the City of Chicago, provides, in part, as follows (Ill. Rev. Stat. 1965, chap. 24, par. 8-2-5):

> " 'Land': expenditures for the acquisition of real estate (or rights therein other than leasehold interests obtained through rental). * * *."

A similar definition is used in the State of Illinois Appropriation Bill (Ill. Rev. Stat. 1965, chap. 127, par. 158).

The Revenue Act of 1939 contains the following definition (Ill. Rev. Stat. 1965, chap. 120, par. 482):

> "(10) Real Property—Real Estate—Land—Tract—Lot—Not only the land itself, whether laid out in town or city lots, or otherwise, with all things contained therein, but also all buildings, structures and improvements, and other permanent fixtures, of whatsoever kind, thereon, and all rights and privileges belonging or in anywise pertaining thereto, except where the same may be otherwise denominated by this Act."

American Jurisprudence defines "land" as follows (42 Am. Jur. 196):

> "It is nomen generalissimum and includes not only the soil, but everything attached to it, whether atttached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings, fixtures, and fences."

In *Bruno* v. *City of Long Branch* (N.J. 1956), 120 A. 2d 760, the Board of Commissioners adopted a resolution authorizing the City officials to convey "lands owned by the City." The court, in holding that the word "lands" included the buildings erected thereon, said (p. 762):

> "In the absence of any contrary inference, we can only assume the Legislature employed the term 'lands' in the present context in its full technical, legal signification, which, as noted above, includes buildings or any other improvements which may exist thereon."

In *Stevenson* v. *Bachrach* (1897), 170 Ill. 253, the court said (p. 256):

> " 'The grant of a tract of land passes everything standing upon the land. * * * A deed to land conveys the buildings thereon. Evidence of the intention of the grantor is inadmissible.' (2 Devlin on Deeds, sec. 863). By the delivery of the deed, which was executed by Dawson to appellee, the grantor therein conveyed to appellee, not only the land, but the portion of the building upon the land."

In *City of Waukegan* v. *Stanczak* (1955), 6 Ill. 2d 594, the court said (p. 605):

> "Where the power to take is a power to take 'real property,' the grant authorizes taking 'all interest held or claimed in lands in fee, for life or for years,' including a fee simple interest. (*Sanitary District* v. *Manasse*, 380 Ill. 27.) So also for 'real property.' (Black, Law Dictionary, West, 1951, p. 1383.) And 'lands' are synonymous with 'real estate' and 'real property.' Black, ibid, p. 1010."

In light of the foregoing, we are of the opinion that you may purchase the one-story brick building at 1150 W. 78th Street, Chicago, Illinois, commonly known as the Doctor's Building, and charge the cost of acquiring the same to Bond Fund #447, Municipal Building Bonds of 1966.

USE OF SINKING FUND FOR PURCHASE OF PARKING FACILITY BONDS

(City Comptroller—S. R. D. September 17, 1968)

We acknowledge receipt of your letter of August 22, 1968, in which you state there is $1,100,000 in the Sinking Fund for Parking Facility Revenue Bonds from the sale of the Englewood Parking Facilities to the Department of Urban Renewal and that there will be deposited into the Sinking Fund from revenues by the end of the year another $733,000, in accordance with the minimum provisions of the Parking Facility Ordinance. You state that some Parking Facility Bonds are available in the open market at 95 to 100 and, if possible, you would like to apply at least a part of the $1,100,000 to the purchase of the bonds below par. You also state that a good argument could be made on the basis that the provisions for the call of bonds for redemption under the Ordinance apply to Sinking Fund deposits from revenue only, and since the $1,100,000 is not from revenue but from the sale of parking facilities it might be possible to use that amount to buy whatever bonds are available in the open market, paying the market price therefor. You request our opinion as to whether you can use the $1,100,000 from the sale of the Englewood Parking Facilities for the purchase of bonds in the open market.

Section 2.03 of the Parking Facility Ordinance (C, J. 9/18/52 pp. 3145-3146) provides in part as follows:

> "The Bonds of Series A are redeemable at the option of the City in part from time to time through use of Revenues on any interest payment date on or after July 1, 1958, on thirty days' notice, only as in the Ordinance provided, at the applicable redemption price set forth in the following schedule, together with the interest accrued to the date fixed for redemption."

Section 6.04 of the Ordinance provides that "the City may sell or dispose of property no longer required for parking facility purposes in accordance with Section 7.06".

Section 7.06 provides in part as follows:

> "The net proceeds of the sale of any such property so sold and the compensation awarded to the City under any condemnation proceedings for the taking of any such property shall be deposited in the Sinking Fund."

Section 4.01 of the Ordinance, dealing with the redemption of bonds, provides in part as follows:

> "Each interest date, July 1, 1958 or later, when there is $50,000.00 or more in the Sinking Fund, Series "A" Bonds shall be called and redeemed so as to exhaust as near as possible all money in the Sinking Fund Account. The amount called shall be allocated as near as possible between bonds of the various projects financed by Series 'A' Bonds as the amount of each project bears to the total amount of Series 'A' Bonds outstanding."

Summarizing the foregoing provisions of the Ordinance it is apparent that the City may sell parking facilities no longer required; that the proceeds of said sale must be placed in the Sinking Fund; and that when there is $50,000 or more in the Sinking Fund the bonds "shall be called and redeemed so as to exhaust as near as possible all money in the Sinking Fund Account". The Ordinance makes no distinction between proceeds deposited in the Sinking Fund from revenue and from the sale of parking facilities. In both instances, the Ordinance provides that if there is $50,000.00 or more in the Sinking Fund, bonds for the amount of money in the Sinking Fund must be called and redeemed. The phrase "called and redeemed" refers to the schedule of redemption dates and redemption price listed in Section 2.03 of the Ordinance.

In the light of the foregong, we are of the opinion that you do not have the legal right to use the $1,100,000 from the sale of the Englewood Parking

Facilities for the purchase of Parking Facility Bonds in the open market, but that you must call and redeem the bonds in accordance with the provisions of Section 2.03 of the Ordinance.

REDEMPTION OF BONDS

(Comptroller—S. R. D.—November 3, 1967)

We acknowledge receipt of your communication relative to the Chicago Parking Facility Revenue Bonds Ordinance (C. J. 9-18-52, pp. 3139-3167) in which you request an opinion "as to whether I may accept tenders of bonds at prices below the call price or whether I must redeem bonds by call only and at the call prices set forth in the Ordinance."

The provisions of the Ordinance are limited to the redemption of bonds (Article IV, Section 4.01, C.J. 9-18-52, p. 3155-3156). Section 4.01 refers to Section 2.03 of Article II of the Ordinance which provides for the dates of redemption and the redemption prices relating to the respective dates of redemption. However, it is our opinion that question involved pertains to the purchase of outstanding and unpaid bonds rather than the redemption thereof.

Section 8-4-12 of the Municipal Code 1961 (Ill. Rev. Stat. 1965, chap. 24, par. 8-4-12) provides as follows:

> "Whenever there is a sum in the municipality's sinking fund in excess of the amount required for the payment of the municipality's bonded indebtedness maturing in that, or the succeeding, fiscal year, and the interest due in that period, the sinking fund commission may use this excess in the purchase of unpaid bonds for the payment of which, at maturity, the sinking fund was or shall be created, paying therefor no more than the market price. When such bonds are so purchased, they shall be cancelled, and thereafter no taxes for the payment of those bonds or the interest thereon shall be levied. The money in a municipality's sinking fund may be applied to the payment of such bonds without any further appropriation by the municipality than is made under this section."

In light of the foregoing, it is our opinion that you may purchase outstanding and unpaid bonds provided, however, that you comply with the provisions of Section 8-4-12 and that the purchase price is less than the current redemption price in Section 2.03 of the Ordinance.

REDEVELOPMENT BONDS—SALE

(City Comptroller—S. R. D.—April 19, 1971)

We acknowledge receipt of your recent communication requesting our opinion as to whether under the terms of the Ordinance of January 27, 1960 (C.J. p. 7792) the Redevelopment Bonds may be sold on a negotiated rather than a competitive basis.

Section 4 of the November 15, 1967 Ordinance (C.J. p. 1233) provided that the City Comptroller shall advertise and receive closed bids for the purchase of said bonds. The January 27, 1970 Ordinance amended Section 4 and provided, in effect, that the City Comptroller may sell said bonds from time to time as the "proceeds are needed for the purpose for which the bonds are authorized." The provision as to competitive bidding was deleted from the January 27, 1970 Ordinance.

We are of the opinion that the Ordinance of January 27, 1970 is controlling and under its terms the City Comptroller has the authority to sell said "bonds on a negotiated bid basis without advance approval by the City Council."

REDEVELOPMENT BONDS—SALE

(City Comptroller—S. R. D.—April 23, 1971)

On April 19, 1971, at your request, we rendered an opinion to the effect that the Redevelopment Bonds may be sold on a negotiated rather than a competitive basis. This opinion was rendered after a discussion with and approval of Mr. Amos Watts, of Chapman and Cutler.

On April 23, 1971, Mr. Watts phoned the undersigned and stated that after re-reading the statute (Ill. Rev. Stat. 1969, chap. 67½, par. 91.128), he has changed his previous opinion. He is now of the opinion that the Redevelopment Bonds must be sold on a competitive rather than a negotiated basis.

In light of the foregoing, our opinion of April 19, 1971 is hereby nullified.

SUBWAY REVENUE BONDS

(City Comptroller—S. R. D.—January 7, 1969)

We acknowledge receipt of your recent communication attaching a copy of your letter to The First National Bank of Chicago, dated August 5, 1968, and a copy of their reply thereto dated October 2, 1968, in which you request the return of certain cash and certain securities pertaining to Subway Revenue Bonds of 1950, now on deposit with the Bank in their Trust No. 40091.

Your letter to The First National Bank of Chicago states that all bonds included in the original $2,000,000 issue (C.J. 6-14-50, pp. 6373-6380) have been retired except for the $150,000 maturing January 1, 1969, together with interest thereon from July 1, 1968 to December 31, 1968, amounting to $1,500, or a grand total of $151,500.00.

Your letter further states that in addition to the securities on deposit with The First National Bank of Chicago, as Trustee, to pay the bonds and interest on January 1, 1969, there is a cash balance remaining as well as $205,500.00 of Treasury Bills listed in said letter. In the letter of August 5, 1968, you requested The First National Bank of Chicago to forward the cash balance to the City Comptroller's office for deposit in the City Transit Fund by the City Treasurer and to forward the $205,500 of Treasury Bills to the City Treasurer to be deposited with the City Transit Fund.

The First National Bank of Chicago, in its letter dated October 2, 1968, acknowledges receipt of your letter of August 5, 1968, and states:

> "We can easily recognize the merit behind your suggestion but we are inclined to feel that to perfect the records of both the city and the bank in connection with this proposal it would be wise to obtain a brief enabling opinion from bond counsel. We should, of course, be happy to abide by any such opinion."

Section 9 of the Deposit Agreement between the City of Chicago and The First National Bank of Chicago, attached to the ordinance authorizing the issuance of $2,000,000 Subway Revenue Bonds of 1950 (C.J. 6-1-50, p. 6380), provides as follows:

> "Section 9. When all of said bonds and interest thereon shall have been paid, all moneys and securities remaining on deposit with the Depositary as sinking fund deposits, or in the Debt Service Reserve, shall be paid and delivered to the City Comptroller and become a part of the City Transit Fund, and this Depositary Agreement shall terminate."

In light of the foregoing, we are of the opinion that any cash balance now on deposit with The First National Bank of Chicago, under their Trust 40091,

shall be delivered to the City Comptroller for subsequent deposit in the City Transit Fund by the City Treasurer. We are also of the opinion that the following securities

	Acquired	Due	Face Value
Subway Debt Service Reserve:			
Treasury Bills	2-15-68	11-30-68	$ 4,000.00
Treasury Bonds 4%	3-13-62	8-15-71	2,000.00
Treasury Bonds 3½%	3-19-62	2-15-90	176,000.00
Treasury Bills	11-30-67	11-30-68	23,500.00
			$205,500.00

now on deposit with The First National Bank of Chicago under their Trust No. 40091 shall be delivered to the City Comptroller for subsequent deposit in the City Transit Fund by the City Treasurer.

RELEASE OF SURETIES

(Bond Department Supervisor, Royal-Globe Insurance Companies—F. H. K.—February 3, 1969)

We are in receipt of your letter of January 30, 1969 requesting that we furnish you with a copy of the above bond executed in 1953 and that you be given a release inasmuch as a successor bond was filed in January 1968 by another surety.

We enclose herewith a copy of the electric signboard bond dated October 1, 1953, to which you refer, the original being filed with the City Clerk.

There is no provision in the ordinance for the cancellation of these electric signboard bonds. It is the policy of the City of Chicago not to release sureties nor cancel bonds that have been duly filed and become public documents. The obvious reason for this policy is that there is no way for the City to determine that no claim for liability will arise thereunder.

The fact that a new bond was filed by another surety company under a new authority which supersedes the above bond from that date should be sufficient for your records.

USE OF SURPLUS FUNDS AND REMAINING PARKING FACILITIES AFTER BOND RETIREMENT

(Commissioner of Streets & Sanitation—S. R. D.—July 17, 1970)

We acknowledge receipt of your recent communication presenting questions pertaining to the use of remaining parking facilities and surplus funds, after all of the existing parking revenue bonds have been paid.

Section 10.04 of the Parking Facility Revenue Bonds Ordinance, enacted by the City Council on September 18, 1952 (C.J., 9/18/52, pp. 3142-3167), provides as follows (C.J., p. 3166):

> "If all of the outstanding Bonds shall have matured, or shall have been duly called for redemption and the redemption date thereof shall have arrived, and if the City shall have deposited with the Depositary in trust, funds pursuant to this Ordinance sufficient to pay and available for the payment of all amounts due on all Bonds then outstanding, including all principal, interest and redemption premiums, if any, then, notwithstanding that any Bonds or interest coupons shall not have been surrendered for payment, the pledge

of the Revenues provided for in this Ordinance and all other obligations of the City under this Ordinance shall cease and terminate.

"Any such funds held by the Depositary or any Paying Agent or the Fiscal Agent which have not been disbursed in the payment of bonds and interest as aforesaid during the period of ten years after the deposit referred to in the foregoing paragraph, shall be paid over to the City together with the schedule of the bonds not paid or redeemed and thereupon the Depositary is relieved of any further duty in the premises.

"No Bond or appurtenant coupon shall, after the maturity thereof either according to its terms or through call of such Bond for earlier redemption, be deemed to be outstanding provided that moneys in the requisite amount for the payment thereof shall have been deposited with the Paying Agent, as trust funds, and are available for payment of such Bond or coupon upon demand."

It is clear from the above-quoted section of the Ordinance that after all bonds have been paid any surplus funds or remaining parking facilities become the property of the City of Chicago, available for any proper municipal use to be determined by the City Council.

Our answers to your various questions will be made on the presumption that the provisions of the Parking Facility Revenue Bonds Ordinance, including Section 10.04 thereof, have been fully complied with and that all Bonds have been retired.

You first ask, "If the City were to sell a sufficient number of parking facilities to pay off all outstanding bonds, what would be the status of any remaining surplus funds and property?" Under the provisions of Section 10.04, the "remaining surplus funds and property" would belong to the City of Chicago, subject to appropriation and disposition by the City Council.

You next ask if it would be possible for the City to "use surplus funds for construction of new parking facilities." Division 71 of the Illinois Municipal Code (Ill. Rev. Stat., 1969, Ch. 24, Div. 71), grants to municipalities the power to construct and operate parking facilities and the power to issue bonds for the purchase of land and the construction of parking facilities thereon. Under Section 11-71-1, a municipality has the power to acquire, construct, manage, control, erect, maintain and operate motor vehicle parking lot or lots, garages constructed on, above and/or below ground level, public off-street parking facilities for motor vehicles. In light of the foregoing statutory provision, we are of the opinion that the City could "use the surplus funds for construction of new parking facilities", if the funds therefor were appropriated by ordinance.

You state that, "At the present time, federal funds are available for up to 50% of the construction costs of 'park and ride' facilities for the C.T.A." You ask whether the surplus funds could be used for this type of construction. The C.T.A. (Chicago Transit Authority) is a separate corporate entity (Ill. Rev. Stat., 1969, Ch. 111⅔, par. 303) and, therefore, the City could not construct parking facilities on property belonging to the C.T.A. However, we find no prohibition in the Parking Facilities Act against the City constructing parking facilities adjacent to or in close proximity to C.T.A. stations for "park and ride" purposes, provided the land and the parking facility is owned, constructed and managed in accordance with the provisions of the Parking Facilities Act. Of course, it would be necessary for the City Council to first pass a parking facility ordinance, and appropriate the necessary funds.

You ask that, "If it is not possible at the present time to use surplus funds (after all bonds are retired), does the City have the authority to enact legislation to make this possible?" We have previously stated that surplus funds (after all bonds are retired and after all provisions of the Parking Facility Revenue Bonds Ordinance, including Section 10.04 thereof, have been complied with) may be used to construct new parking facilities. It would not be necessary to enact new legislation, as the City already has the power under the Parking Facilities Act (Ill. Rev. Stat., 1969, Ch. 24, Div. 71) to acquire land and construct parking facilities with City funds. However, as previously stated, the City Council would

have to pass an ordinance appropriating the funds and provide for the construction of the new parking facilities.

Finally, you ask if the revenue from the on-street parking meters may "be used to subsidize future City parking programs after all the bonds are retired." Section 11-71-1 of the Parking Facilities Act provides that the City may acquire, equip, manage, control, maintain and operate parking meters, the revenue of which may be used for the purposes set forth in the Act. We are, therefore, of the opinion that the revenue from on-street parking meters could "be used to subsidize future City parking programs after all the bonds are retired."

Summarizing the foregoing, we are of the opinion that after all existing parking facilities bonds have been retired and after all of the provisions of the Parking Facility Revenue Bonds Ordinance, including Section 10.04 thereof, have been complied with, any surplus funds and remaining parking facilities may be used by the City of Chicago for any corporate purpose, including the construction and operation of future parking facilities in accordance with the provisions of the Parking Facilities Act (Ill. Rev. Stat., 1969, Ch. 24, Div. 71), provided the City Council has enacted an ordinance and has appropriated funds for the construction and operation of the future parking facilities.

TRANSPORTATION BOND ACT—CONSTRUED

(Commissioner of Public Works—S. R. D.—May 4, 1972)

You have requested us to examine the provisions of the Transportation Bond Act (Ill. Rev. Stat. 1971, ch. 127, par. 701 et seq.) to determine whether, under the provisions of the Act, it is possible for the State to advance money to be used by the City for the acquisition, construction, reconstruction, extension and improvement of arterial highways within the limits of the City or whether it is first necessary for the City to expend the money and then receive reimbursement from the State.

Section 2 [a] of the Act provides that the proceeds of the $900,000,000.00 Bond Issue are to be used for "the acquisition, construction, reconstruction, extension and improvement of State highways, arterial highways, freeways, roads, structures separating highways and railroads and bridges". Section 2 also provides that $600,000,000.00 of the Bonds will be used for State highway acquisition, construction, reconstruction, extension and improvement as specifically described herein, hereinafter called the 'Transportation Bonds, Series A' ".

It is elementary that in construing the meaning of a statute, it is of tantamount importance that the intent of the legislature be ascertained and be given effect. *Petterson* v. *City of Naperville* (1956), 9 Ill. 2d 233; *Hagen* v. *City of Rock Island* (1959), 18 Ill. 2d 174; *Illinois Chiropractic Society* v. *Giello* (1960), 18 Ill. 2d 306; *Department of Public Wks. & Bldgs.* v. *Schon* (1968), 96 Ill. App. 2d 402; *People* v. *Williams* (1969), 116 Ill. App. 2d 332.

It has been held that the word "use" means "an act of employing or state of being employed; to convert to one's service; to employ". (*Revzan* v. *Nudelman* (1938), 370 Ill. 180, 184-185.) "To be used" indicates a future "use" and therefore, the statutory provision that the proceeds from the Bonds are "to be used for the acquisition, construction, reconstruction, extension and improvement of State highways, arterial highways, freeways, roads, structures, separating highways and railroads and bridges" can only mean that the proceeds of the Bonds shall be advanced to a municipality to be used for the purposes set forth in the Act, rather than that the municipality should first expend the money for said purposes and then receive reimbursement from the State from the proceeds of the sale of the Bonds. Any other construction of the Act would be contrary to the clear language and intent of the Act.

This construction is supported by the provisions of Section 2 [b] [3] which provides that the proceeds of the Bonds may be used "for the purpose of reim-

bursing the General Revenue Fund for monies paid from the General Revenue Fund after the passage of the Act for the purpose described in Section 2 [b] [2]".

If it was the intent of the legislature that the municipality should first expend the funds and then receive reimbursement, the legislature would have used the phrase "To be REIMBURSED FOR THE ACQUISITION, etc.", rather than that the proceeds of the Bonds are "to be used for the acquisition, etc.".

The legality of the Transportation Bond Act was sustained in the case of *People ex rel. Ogilvie* v. *Lewis* (1971), 49 Ill. 2d 404. The Court, in discussing the purposes of the Act, said:

> "As we have indicated above, the Transportation Bond Act states that it has two specific purposes. The first is 'promoting and insuring rapid, efficient and safe highway, air and mass transportation for the inhabitants of the State' by providing funds, grants and loans to be used for the 'acquisition, construction, reconstruction, extension and improvement' of highway transportation, mass transportation, and aviation facilities and for the acquisition of real property and interests in real property which are required in connection therewith. Sub-section 2 (a) defines how the funds are to be expended for highway transportation purposes; and sub-section 2 (c) specifies how the funds are to be spent for aviation purposes".

In light of the foregoing we are of the opinion that the proceeds of the Bonds provided for in the Act should be advanced by the State to be used by the municipality for "the acquisition, construction, reconstruction, extension and improvement of State highways and railroads and bridges", as well as for the other purposes set forth in the Act; and that it would be contrary to the clear intent of the Act to require a municipality to first expend the money and then receive reimbursement from the State.

CHAPTER XI—CITY PROPERTY

Section A. REAL ESTATE

ANNEXATION OF EAST BANK OF NORTH SHORE CHANNEL

(Commissioner, Department of Development & Planning—R. L. H.—January 31, 1969)

Your memorandum and attachments thereto dated December 6, 1968, in the above matter in effect requests our opinion as to the procedures to be followed to effectuate a disconnection of the above cited property from the Village of Lincolnwood and an annexation thereafter to the City of Chicago.

The statutory provision can be found in Chapter 24, Section 7-1-24 of the Illinois Revised Statutes (1967) which states:

7-1-24. *Disconnection and annexation of part of a municipality by ordinance-Petition-Map.*

§ 7-1-24. On petition in writing, signed by one-half of the electors and one-half of the owners of record of land in any territory, not exceeding in area 160 acres, situated within any municipality, which area is contiguous to another municipality, the corporate authorities of the municipality within which the territory is situated, may consent, by ordinance, that this territory be disconnected from such municipality and annexed to the other municipality to which the territory is contiguous. The ordinance must be passed by a majority vote of the corporate authorities of the disconnecting municipality. Thereupon the corporate authorities of the annexing municipality, by ordinance passed by a majority vote, may annex the territory. The territory, however, shall not be disconnected from the municipality of which it is a part until it is annexed to the municipality to which it is contiguous.

The clerk of the annexing municipality, within 90 days after the passage of the annexing ordinance, shall file for recordation a certified copy of the ordinance, with an accurate map of the territory annexed, with the recorder of deeds of the county in which the annexed territory is situated. As amended by act approved Aug. 9, 1963. L. 1963, p. 2629.

It will be necessary for the Metropolitan Sanitary District of Greater Chicago the owner of the said territory on which no electors reside, to petition the Board of Trustees of the Village of Lincolnwood to disconnect the said territory from the said Village in order that the said property may be annexed to the City of Chicago. Upon passage of such an ordinance, an ordinance shall be presented to the City Council of the City of Chicago, with copy of the Lincolnwood ordinance attached thereto, for the annexation of the said territory. Upon passage of this ordinance, a copy of same with map attached is then to be recorded with the Cook County Recorder.

GRATUITOUS DISPOSITION OF CITY PROPERTY

(City Comptroller—S. R. D.—April 29, 1968)

We acknowledge receipt of your letter of March 28, 1968, in which you state:

"Mr. Keith Hubbs, President of the 'Ken Hubbs Foundation' in Colton, California, phoned Mayor Daley and asked that the City allow Mr. Carl

Waldvogel, Jr. of Bensenville, Illinois to farm certain unsued land adjacent to O'Hare Field, which is owned by the City. He does not expect the City will require any compensation for use of this land. The area would be used to grow vegetables which would be sold by Mr. Waldvogen and the profits sent to the Hubb Foundation."

A municipal power to use and dispose of municipal property does not include the power of donation or gratuituous disposition. *Normal School* v. *City of Charleston* (1916), 271 Ill. 602; *Gritton* v. *City of Des Moines* (1955), 73 N.W. 2d (Iowa) 813; 63 C.J.S. (1950 ed.), Municipal Corporations, Section 965, p. 515.

It is our opinion that the City of Chicago could not legally lease unused land adjacent to O'Hare Field, which is owned by the City, without receiving a reasonable compensation therefor.

COMPENSABILITY OF COST OF REPAIRS PRIOR TO EMINENT DOMAIN

(Tribune Action Express Column—R. F. S.—August 16, 1968)

Responding to your recent letter in which you ask whether or not the cost of repairs prior to eminent domain are compensable, I am pleased to point out the following:

Under the Illinois eminent domain law property acquired must be valued *as a whole* and compensation *cannot* be paid for any separate element of value or separate items of cost or expense. Therefore, neither the cost of repairs (nor depreciated costs) can be paid *as a separate item of compensation.* (This, incidentally, is not a matter of city policy, but rather a matter of state law).

While *no separate payment* can be made for repair expense, it should be observed, however, that insofar as repairs maintain or improve the condition of the property, such expense could have an effect on the value of the property *as a whole.* Accordingly, insofar as such expense maintains or improves the condition of the property, it would be indirectly compensated for (or reflected in) the price paid for the property acquired.

OWNERSHIP OF IRREMOVABLES

(Commissioner, Department of Urban Renewal—T. A. F.—July 13, 1967)

You have requested an opinion in regard to the ownership of specified fixtures located in the property identified as Parcel No. 41-139 in Project Congress-Racine. The facts are that, on October 11, 1965 Parcel No. 41-139 in Project Congress-Racine was acquired by the City of Chicago, by deed. Part of the consideration for the purchase price included irremovables.

A business relocation claim has been made by Saig Plastic Company, Inc., one of the tenants of said premises, which includes a claim for a part of said irremovables. The claim has been held in abeyance until the ownership of the irremovables has been determined.

As between the landlord and tenant, the intention of the parties is controlling as to whether or not fixtures attached to the realty remain personal property. Where the intention cannot be clearly shown, the nature of the fixtures, and the extent of the attachment to realty, determine whether it is considered realty or personalty.

We have considered the terms of the lease between the landlord and the tenant herein involved, and said terms make no provision for the retention of any of the fixtures by the lessee upon the termination of the lease. On the other hand, there is a provision in said lease that states that, in the event the said property is acquired through eminent domain proceedings, the Lessee shall have no claim to any part of the award.

In the present instance, in the absence of any specific provision, power wiring and process piping by their very nature become a part of the realty and would be considered irremovables. In our opinion, the power wiring and process piping became, and were the property of the landlord, and were acquired by the City in Eminent Domain proceedings.

RENEWAL OF LEASES

(City Comptroller—J. L. F.—October 18, 1967)

As a precautionary measure, it has occurred to us that, whenever a current lessee is desirous of entering into a renewal lease, your office should endeavor to ascertain whether or not the said lesseee is in performance of its or his obligation of the current lease or is in any manner in default thereof.

This will enable us to determine the advisability of approving renewal leases for parties requesting them.

MISTAKE IN COLLECTION OF RENT

(City Comptroller—S. R. D.—February 5, 1969)

We acknowledge receipt of your letter of January 22, 1969, in which you state that the property at the southwest corner of Adams and Franklin Streets, Chicago, is currently leased to the Rissman Building Company. The lease is for ninety-nine years and has an unexpired term of about seventeen years. The documents attached to your letter reveal that the original lease provides for a rental of $12,000 per year, payable in quarterly installments; that in 1942, The Mercantile Building Corporation, the then holder of the leasehold interest, had financial reversals resulting in losses of $19,000 to $27,000 per annum from the operation of the leasehold; that for seven years prior to August 14, 1941, the lessee had been paying but one-half of the quarterly rental installments, or at the rate of $6,000 per annum, and notice of termination of the lease was served upon the lessee by the City in 1941 and that the lessee proposed and offered to continue its tenancy upon the condition that the lease be modified to reduce the rental for the period commencing August 15, 1941, and terminating August 14, 1961, to $9,000 per annum, which, in the opinion of the parties, was a fair rental value. Thereafter, an ordinance was passed by the City Council (C.J. 6-3-42, p. 7049), which directed the City Comptroller to amend and modify the lease dated June 29, 1886, to provide that the annual rental for the premises for the period commencing August 15, 1941, and terminating August 14, 1961, shall be at the rate of $9,000 per annum, payable quarterly in advance. The ordinance further provided that upon execution of said lease, the lessee shall be released from payment of all rent in excess of $6,000 per annum due under said lease prior to August 15, 1941.

You state that although it is apparent the annual rental for the premises is $12,000 per annum after August 14, 1961, your office, through inadvertence, has continued to bill and collect at the rate of $9,000 per annum. You ask our opinion as to whether you can bill the present lessee, Rissman Building Company, for the additional $3,000 a year from August 14, 1961, to date.

The law is clear that a partial payment of a fixed and certain demand, which is due and not in dispute, is not full satisfaction of the entire debt, notwithstand-

ing any conditions placed upon the debtor upon acceptance of the payment. *In re Estate of Cunningham* (1924), 311 Ill. 311); *Northwestern Yeast Co.* v. *City of Chicago* (1939), 301 Ill. App. 303; *A. & H. Lithoprint, Inc.* v. *Bernard Dunn Advertising Co.* (1967), 82 Ill. App. 2d 409.

In the situation under consideration, the agreement between the parties, as evidenced by the Council Proceedings of June 3, 1942, specifically provided that the rental of $9,000 per annum should commence on August 15, 1941, and terminate on August 14, 1961. The lease provides for an annual rental of $12,000 and, therefore, from and after August 14, 1961, the annual rental for the leased premises was and is $12,000, paayble quarterly in advance. This is a fixed and liquidated amount and, therefore, the payment of $9,000 as the annual rental for the premises after August 14, 1961, was merely a partial payment of the fixed and definite rental of $12,000 per year.

We are of the opinion that you should now collect from the Rissman Building Company the sum of $3,000 per year from August 14, 1961, to date and that hereafter the Rissman Building Company should pay $12,000 per annum, in accordance with the terms of the lease dated June 29, 1886.

LEASE OF NAVY PIER FACILITIES

(City Comptroller—R. L. C.—October 31, 1968)

Your letter of October 28, 1968, recites the fact that three different exhibitors have applied for a lease of Navy Pier for the identical dates in 1969 (i.e. January 6 to January 19 and July 7 to July 20). One of the three has made a $5,000.00 advance deposit and you ask if it is appropriate to similarly accept deposits from the other two if the same are offered. You further ask whether to deposit such advance payments or to hold the checks pending approval of the lease.

Lease of the facilities at Navy Pier require City Council action and until the Council authorizes the execution of the lease to one of the applicants, caution should be exercised by all agencies concerned in dealing with the matter. It is not clear from your letter whether the deposit received from one of the applicants was solicited or voluntary. However, the acceptance of any deposit should be upon the express understanding that the same does not confer any right or preference upon the depositor nor impose any obligation upon the City in regard to a subsequent determination by the Council as to the successful applicant.

If the acceptance is expressly made upon this basis, it is our opinion that whether you deposit or hold the same is of little consequence, as no legal right eminates from either course. All deposits received from applicants whose applications are not subsequently approved by Council action should, of course, be returned at the earliest possible dates.

SALE OF PARKING FACILITY PROPERTY

(City Comptroller—S. R. D.—May 9, 1968)

We acknowledge receipt of your communication in which you state that Commissioner James V. Fitzpatrick requests the sale of eighteen feet of 150 foot frontage of Parking Lot #70 located at 4715 N. Western Avenue, Chicago, Illinois, to a Savings and Loan Company, adjoining said property, for use as an alley. You further state that Parking Lot #70 produced net operating revenue of $3737 in 1966 and $2290 in 1967. You also say that DeLeuw Cather and Company, consulting engineers for the Parking Facilities, has not given its approval to the proposed sale.

You request our opinion "as to the feasibility of selling a part of the lot" and, if legally possible, that we "arrange to obtain appraisals from two indepen-

dent appraisers and submit them to the Appraisal Committee for approval of price."

The provisions of the Chicago Parking Facility Revenue Bonds Ordinance (C.J. 9-18-52, pp. 3142-3167) must be satisfied before Parking Facility property can be sold. Although Section 6.04 provides that the City will not permit the sale of any of its Parking Facilities or any part thereof, if the property is no longer required for Parking Facility purposes it may be disposed of in accordance with Section 7.06 of the ordinance.

Section 7.06 (C.J. 9-18-52, p. 3161) provides that the "City shall have the right to sell or otherwise dispose of any property, real or personal no longer necessary, appropriate or required for the use of, profitable to, or for the best interests of the City operation of its parking facilities as provided by law."

It is our opinion that the question of selling a part of the lot and the securing of appraisals should remain in abeyance until there has been compliance with Sections 6.04 and 7.06 of the Ordinance. Since Parking Facility Lot No. 70 is "profitable to" the City, Section 7.06 prohibits its sale.

PERSONAL INJURY—MAINTENANCE OF SIDEWALKS

(City Council—R. E. L.—April 21, 1969)

On April 21, 1969, the Illinois Appellate Court reversed a judgment of the Circuit Court of Cook County and remanded the cause with directions. The Circuit Court had entered judgment on a jury verdict in favor of the defendant, City of Chicago, in plaintiff's personal injury action for damages based on the alleged negligence of the defendant in the maintenance of its sidewalks.

In late November or early December of 1959, the defendant City dug up a parkway on Thomas Street near Pulaski Road to install a new lighting system. The project was completed in a few days and the ditch in the parkway was filled. On January 12, 1960, at about 7:15 P.M., plaintiff was walking West on Thomas from Pulaski Road when he fell on the sidewalk and was injured. The testimony at the trial established that the sidewalk had been clean prior to the accident and that on the day of the accident there was a record breaking rainfall. Plaintiff testified that the rain was washing clay from the parkway onto the sidewalk making it slippery. The jury verdict was in favor of the defendant, City of Chicago, and judgment was entered on the verdict. The plaintiff appealed from this judgment alleging that three of defendant's instructions constituted prejudicial error and that the testimony of defendant's engineer in charge of the sidewalk division was erroneous.

The Illinois Appellate Court reversed the judgment of the Circuit Court of Cook County and ordered that the cause be remanded with directions. The Court held that the defendant's instructions constituted prejudicial error stating that:

> "It is our conclusion, based upon the above discussed cases, that if a municipal corporation causes something to be done either on or adjacent to a sidewalk, which results in clay or some other material being washed onto the sidewalk so that it becomes slippery and consequently dangerous, even though the sidewalk has no defect *in it* the situation is within the rule that the municipal corporation is liable for improper formations caused in 'an artificial and unnatural way.'" (Op. p. 7.)

The Court further held that:

> "We find that the City, having caused the work to be done on the parkway prior to the occurrence, had notice of the parkway's condition and its proximity to the sidewalk." (Op. p. 9.)

The cause was accordingly reversed and remanded to the trial court with instructions to hold a new trial consistent with the views expressed in the opinion.

POSTING OF SIGNS

(Chief Administrative Officer, Committee on Finance—A. H.—September 19, 1968)

Your recent request for an opinion regarding an Order submitted by Alderman Casimir J. Staszcuk, covering the posting of signs on City-owned poles, has been referred to the undersigned for consideration and response.

The proposed Order, attached to your letter, directs the Committee on Finance to give consideration to the provision of funds for the posting of signs on the existing street poles from W. 67th Street to W. 71st Street on S. California Avenue, designating same "Lithuanian Plaza."

During our recent conference, there appears that no ordinance directing that California Avenue be renamed or supplementally named as "Lithuanian Plaza" has ever been introduced nor is one pending before the City Council. Section 11-80-19 of the Municipal Code of Illinois (Ill. Rev. Stat. 1967, ch. 24, par. 11-80-19) delegated to the corporate authorities of each municipality the power to name or change the name of any street, avenue, alley, or other public place. Such power must be exercised by an ordinance, not by an order. See, *e.g., Lamm* v. *City of Danville,* 221 Ill. 119, 126; *Chicago & N.P. RR.* v. *City of Chicago,* 174 Ill. 439.

In the absence of an ordinance renaming or supplementally naming California Avenue in the area designated as "Lithuanian Plaza," it would appear that the Order directing the Finance Committee to give consideration to the provision of funds for the aforesaid purposes is premature. It should also be noted that in an earlier opinion rendered by this office (20 Op. Corp. Coun. 215) we suggested the impropriety of attempting to name or rename a portion of a street, but stated that the name selected must be given to the entire length of the street. In the instant suggested Order, it appears that only four blocks of California Avenue would be involved, contrary to the above-cited opinion.

DAMAGES CAUSED BY COLLAPSE OF TUNNEL

(Commissioner of Public Works—J. K. M.—August 17, 1967)

It is our opinion that since the City of Chicago owns and controls the Chicago Freight Tunnel, the City of Chicago will be responsible for any damage caused by the Tunnel.

If your department is satisfied that the proximate cause of the cave-in underneath the Milwaukee Railroad tracks in the vicinity of N. Halsted Street and Carroll Avenue is due to the presence of the Tunnel, the City should make repairs for said damage.

Section B. WATERWORKS AND SEWERS

EXEMPTION OF CITY FROM ILLINOIS REFUSE DISPOSAL LAW

(Commissioner, Department of Streets and Sanitation—F. G. S.—October 14, 1969)

Your letter of September 18, 1969, requesting an opinion as to whether the City of Chicago is legally required and/or whether it is advisable to file for a Certificate of Exemption under Section 6 of the Illinois Refuse Disposal Law,

(Ill. Rev. Stat. 1967, Ch. 111½, Par. 476) has been referred to the undersigned for reply.

Section 6 specifically provides among other things, that the act shall not apply to any City which provides for the registration and regulation of refuse disposal sites and facilities if the provisions of the act as to minimum standards for the location, design, construction, sanitation, operation maintenance and discontinuance of the operation of refuse disposal sites are met as a minimum.

Section 6 provides further that the fact of the non-application of the act to a City shall be evidenced by a Certificate of Exemption issued by the State of Illinois Department of Health upon receipt of proof by the Department of a municipal resolution, ordinance or regulation prescribing such minimum requirements.

It is our opinion that the language of Section 6 of the Refuse Disposal Law referred to above is clear and unequivocal. The City is legally required to file proof with the State of Illinois Department of Health that it provides for the registration and regulation of refuse disposal sites as well as proof of the enforcement of a municipal ordinance prescribing minimum standards for the location, design, construction, sanitation, operation, maintenance and discontinuance of the operation of refuse disposal sites in conformity with the provisions of said Refuse Disposal Law, in order to be exempt from the operation of the Act.

If the Department of Streets and Sanitation, Bureau of Sanitation makes the policy decision to file for an exemption certificate, it is suggested that you submit with your request to the State of Illinois Department of Health for a Certificate of Exemption under Section 6 of the State of Illinois Refuse Disposal Law, pertinent provisions of the Municipal Code of Chicago contained in Chapter 99, Sections 99-14 through 99-42.1 together with appropriate regulations and enforcement procedures of the Bureau of Sanitation Department of Streets and Sanitation as evidence of compliance with the standards created by the Act.

CONTRACT FOR THE SUPPLY OF WATER BY CITY

(Commissioner of Water and Sewers—W. M. Z.—May 27, 1971)

Please refer to your communication of March 30, 1971 which reads as follows:

> "We are attaching, herewith, a letter from the Elmhurst-Villa Park-Lombard Water Commission, advising of a study to determine the possibility of a contract with the City of Chicago to supply water to the Commission.
>
> "In connection with this study they need to know whether or not the City of Chicago can legally enter into a contract, assuming it is approved by the City Council, for a period of twenty-five (25) years or more.
>
> "Your advice in this matter will be appreciated."

It is our opinion that the City of Chicago can legally enter into a contract with a Water Commission for a period of twenty-five (25) years or more.

May we call your attention to Chapter 24, Section 11-135-8, Illinois Revised Statutes, 1969, which, in part, reads as follows:

SALES—CONTRACTS

> "Such commission shall have the power to contract with any person, corporation or political subdivision or any municipal corporation or other agency for a supply of water, or to supply water to such person, corporation, municipal corporation or political subdivision. Any such contract entered into to supply water to a municipal corporation or political subdivision shall provide that the payments to be made thereunder shall be solely from the revenues to be derived by such municipality or political subdivision from the operation of the waterworks system of such municipality or political sub-

division, and said contract shall be a continuing, valid and binding obligation of the municipality or political subdivision, payable from such revenues for such period of years, not to exceed 40, as may be provided in such contract." We would also call your attention to Chapter 24, Section 11-137-5 of the Illinois Revised Statutes, 1969, which, in part, reads as follows:

CONTRACT FOR WATER SUPPLY—PAYMENT

"A municipality may contract with any person for a supply of water for public use for a period not exceeding 30 years."

SEWER CHARGE—OUT OF TOWN

(Commissioner of Water & Sewers—P. J. E.—October 29, 1969)

We have your letter of August 8, 1969, requesting an opinion as to the liability of Mr. Zygmunt—who took title to the premises at 4620 N. Narraganset Avenue, which is outside of the City of Chicago, on July 2, 1968—for sewer service charges extending back over a period of many years.

We examined the title and found that three different persons previous to Mr. Zygmunt have been in title since 1948 when these service charges began to run if the rates were the same then as they are now.

In Chapter 24-11-141-7 of the Revised Illinois Statutes, 1967 authority is given to the corporate authorities of any municipality that owns and operates a sewerage system constructed or acquired under the provisions of any law of this state the right to charge the inhabitants for the use and service of its sewerage system within or without the corporate boundary and to establish charges or rates for that purpose.

Such charges or rates are liens upon the real estate upon or for which sewerage service is supplied whenever the charges or rates become delinquent.

However, the municipality has no preference over the rights of any purchaser, mortgagee, Judgment creditor or other lien holder arising prior to the filing of the notice of such a lien in the office of the recorder of deeds of the county in which such real estate is located or in the office of the registrar of titles of such county if the property affected is registered under the Torrens system.

Mr. Zygmunt is a subsequent purchaser and is not liable for the part of the bill incurred by former owners.

A case in point is *Cocanig* v. *The City of Chicago,* 21 Illinois 2nd 464, wherein Cocanig filed suit to enjoin the City from shutting off the water to enforce collection of a water bill left unpaid by a former owner of the property. There the Court held that Cocanig was not liable for the water bill which was not contracted for by him or known to him and ruled that the plaintiff was entitled to an injunction.

It is therefore our considered opinion that Mr. Zygmunt is only liable for that portion of the sewer service charge for the period that he has owned the property, that is from July 2, 1968 to the present.

LEGALITY OF SALE OF WATER TO SUBURBAN MUNICIPALITY

(Commissioner, Department of Water and Sewers—S. R. D.—July 13, 1967)

You request our opinion as to whether, in light of the United States Supreme Court decree entered on June 12, 1967, the City of Chicago can continue entering into contracts for furnishing water to suburban municipalities,

and, if so, whether the suburban municipality requesting the water supply must obtain approval from the State of Illinois prior to contract negotiations with the City.

There is nothing in the decree which prohibits the City of Chicago from proceeding in the same manner as it has in the past relative to furnishing water to suburban municipalities.

LIABILITY OF CITY FOR DAMAGES CAUSED BY BROKEN WATER MAIN

(Chairman, Committee on Finance—J. K. M.—May 20, 1968)

In reply to your request for an opinion as to whether the City of Chicago is liable for water damage to the 208 South LaSalle Street Building caused by a broken water main on September 26, 1966, it is our opinion that the City of Chicago is not liable.

By consulting with City of Chicago engineers, we have been advised that the City of Chicago had no prior notice of a defect in the condition of the cast iron pipe which burst, said pipe lying at least 6 feet below the ground. There is no equipment presently in use by which a defect in pipe can be determined from above ground level. The only way of inspecting said pipe is by excavating into the street. Therefore, it is our position that the City of Chicago was guilty of no negligent act or failure to take any precautions which it might have taken.

Our office has no record of any lawsuit filed by the 208 South LaSalle Street Building or any notice served upon the City Clerk for damages to said building. I wish to call your attention to the following sections of the Illinois Revised Statutes:

Chapter 85 Section 8-101. Limitation of actions.

§ 8-101. Limitation of actions "No civil action may be commenced in any court against a local entity for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued."

Chapter 85 Section 8-102. Notice of injury.

§ 8-102. Notice of injury "Within 6 months from the date that the injury or cause of action, referred to in Sections 8-102 and 8-103, was received or accrued, any person who is about to commence *any* civil action for damages on account of such injury against a local public entity, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused the injury, must personally serve in the Office of the Secretary or Clerk, as the case may be, for the entity against whom or against whose employee the action is contemplated a written statement, signed by himself, his agent or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, the general nature of the accident and the name and address of the attending physician, if any."

Chapter 85 Section 8-103. Effect of failure to serve notice.

§ 8-103. Effect of failure to serve notice. "If the notice under Section 8-102 is not served as provided therein, any such civil action commenced against a local public entity, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused the injury shall be dismissed and the person to whom such cause of injury accrued shall be forever barred from further suing."

Chapter 85 Section 1-204. Injury.

§ 1-204. Injury. "Injury" means death, injury to a person, *or damage to or loss of property*. It includes any other injury that a person may suffer

to his person, reputation, character or estate which does not result from circumstances in which a privilege is otherwise conferred by law and which is of such a nature that it would be actionable if inflicted by a private person."

Thus, even if the City of Chicago were to be guilty of negligent conduct the failure of the owners of the building to serve notice within 6 months, or file a lawsuit within one year now precludes them from maintaining a civil action.

WATER SUSPENSE ACCOUNTS

(Commissioner of Water & Sewers—W. M. Z.—November 24, 1967)

Please refer to your communication of November 14, 1967 with reference to the above matter, which reads as follows:

"Section 8-1-11 of the Municipal Code provides that:

The commissioner of water and sewers shall cause to be opened in the general ledger of the Bureau of Water two accounts, to be known as the suspense accounts number 1 and number 2. In suspense account number 1 shall be shown the totals of all of the accounts and items which may be ordered transferred under any section relating to frontage rates accounts; and in suspense account number 2 shall be shown the totals of all the items which may be ordered transferred under any section relating to meter rates accounts.

"The commissioner of water and sewers shall provide suitable detailed ledgers, in which the detailed accounts of suspense accounts number 1 and number 2 shall be kept and shown. All accounts affected by order of court and recommendations of the corporation counsel shall come within the scope of this section. Passed Coun. J. 11-10-52, p. 3412.)

"During the year of 1962 a total of $1,848.77 was accumulated in suspense account No. 1, and $15,141.36 was accumulated in suspense account No. 2, making a grand total of $16,990,13 in the two accounts for the period involved.

"The Superintendent of Water Collections has in every way available to him made diligent and repeated efforts to collect those delinquent water charges in accordance with the amounts shown in these two suspense accounts during the above period.

"We would appreciate it very much if you would advise us of your opinion on this matter so that we may dispose of these delinquent charges."

An examination of the records kept by your department and the records of your accounts forwarded to our department for collection, indicate that every effort has been made to collect the water suspense accounts for the year 1962.

It is our opinion that these accounts are uncollectible and under modern accounting methods should no longer be carried on your records as a valuable asset. You, no doubt, are aware that the statute of limitation on open accounts is five (5) years. Therefore, it is our opinion that the items in suspense accounts number 1 and number 2, for the year 1962, are uncollectible and should be stricken from your records.

Section C. TAXATION OF CITY PROPERTY

MUNICIPALLY OWNED VEHICLES

(City Comptroller—R. F. F.—March 10, 1972)

This is in answer to your inquiry whether municipally-owned vehicles need display the City of Chicago vehicle sticker.

Chapter 29 of the Municipal Code of Chicago requires vehicles owned by residents of this City to display the City of Chicago wheel tax license plate or emblem. (An "emblem" is commonly known as a "sticker.") However, municipally-owned vehicles are exempt from license fees (Secs. 29-4 and 29-15 of the Municipal Code). Section 29-15 requires that municipally-owned vehicles be identified either by displaying the City license or emblem (supplied without fee) or by painting on the vehicle the name of the municipal owner of the vehicle in letters one and one-half inches high. Either method is permissible.

CHAPTER XII—CONTRACTS

Section A. BIDS AND AWARDS

JUSTIFICATION OF AWARD OF CONTRACT

(Purchasing Agent—J. E. S.—February 13, 1968)

Pursuant to your request for a revised opinion of counsel, addressed specifically to the facts that justified the award and referring specifically to citations of applicable legal authorities as related to the above cited matter, be advised of the following.

A. The determination that subject contract be awarded to the second bidder, Michael J. McDermott & Co. as the lowest responsible bidder, was predicated on the fact that the contract documents, Part 1, S.C. Page 18, in the clause relating to subletting was contained the requirements that the contractor shall perform with his own organization, contract work amounting to not less than 50% of the total cost computed on the basis of items other than specialty items as therein further defined. In analyzing the contract documents and the list of subcontractors as submitted by Pathman Construction Company, it was determined by the Department of Purchases, Contracts and Supplies that Pathman, in fact, intended to perform less than 50% of the contract with his own forces.

B. The Bureau of Engineering of the Department of Public Works, after an evaluation of complainant's equipment, organization and experience, in an effort to determine complainant's ability and fitness to successfully fulfill the contract requirements, referred to the provisions contained in the "MANUAL OF INSTRUCTIONS FOR DETERMINING CONTRACTOR'S PREQUALIFICATION RATING" as issued by the Division of Highways, Department of Public Works and Buildings, State of Illinois.

With regard to the rating given a contractor who has had limited or no experience in bridge construction, the following is a direct quotation:

> *"Reinforced Concrete Bridges*—Contractors with limited experience in *Reinforced Concrete Bridge* construction are given a starting rating not to exceed $100,000. Experienced and well-equipped bridge contractors are given bridge ratings commensurate with their annual volume of bridge work. Old established paving and general contractors are rated in accordance with their ability. Established building contractors wishing a bridge rating will be given a rating based on their ability as building contractors. An effort will be made to keep these contractors on the same basis.
>
> "Railroad Grade Separations—Same as above, but is necessary to have successful *experience* for this classification."

As can be noted the Illinois Division of Highways requires that the contractors have successful experience in bridge construction before allowing a contractor to bid on railroad grade separations; and even in the case of reinforced concrete bridges they normally give a starting rating not to exceed $100,000.

From information made available to the Bureau of Engineering and the Purchasing Agent, Pathman is completely lacking of bridge experience.

C. Part 1, S.C. Page 4, incorporates by reference into the Contract proper the Standard Specifications for Road and Bridge Construction issued by the Department of Public Works and Buildings, State of Illinois. Articles 2.11, 2.12(a), 3.1 and 3.2 relate to "Disqualification of Bidders", "Competency of Bidders", "Consideration of Proposals" and "Award of Contract" respectively.

Among other reasons therein cited Article 2.11(e) provides that lack of competency as revealed by the financial statement or experience questionnaire required under Article 2.12 may be considered as sufficient for disqualification. Further by Article 3.1, in awarding Contract, the Department will, in addition to considering the amount stated in the proposal, take into consideration the responsibility of the various bidders as determined from a study of the data required under Article 2.12 and from other investigations which it may elect to make, and thereafter by Article 3.2 it is provided the Contract will be awarded to the bidder who has submitted the lowest proposal complying with all requirements, including the requirements of the specifications as to the responsibility of bidders.

In addition to the failure of performance criteria and of experience in the type of construction contemplated by the Contract, the Purchasing Agent after receipt of an independent examination of Pathman's Statement showing financial condition prepared by a public accountant, Arthur Andersen & Co., determined that satisfactory evidence of competency to perform the work contemplated was lacking, and did not further comply with the requirements of "Contractor's Financial Statement" appearing on G.C.—Page 4 of the contract proper.

D. From the foregoing, it is the opinion of this Department that as provided in Section 8-10-11 of Chapter 24, Ill. Rev. Stat. 1967, in determining the responsibility of the bidder, the Purchasing Agent did not abuse discretion, did not act unreasonably, acted in accordance with the procedures adopted for and utilized in the administration of the Department of Purchases, Contracts and Supplies, and in all respects complied with the pertinent provisions of the "Municipal Purchasing Act for cities of 500,000 or more population", as contained in the Illinois Municipal Code, Approved May 29, 1961, as amended. (Chapter 24, Ill. Rev. Stat. 1967). Also see Vol. 10, McQuillan Municipal Corporations, Sec. 29.73a, 1966 Rev. Ed.

E. As was pointed out in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, the statutes requiring advertising for bids and award based upon the most advantageous bid submitted by a responsible bidder were enacted for the benefit and protection of the government, and confer no enforceable rights upon bidders.

LOWEST BIDDER

(Purchasing Agent—F. P. K.—November 9, 1970)

Your letter of October 26, 1970 requests an opinion as to whether or not John N. Brunsfeld & Sons, Inc. roofing contractors, can be considered as the lowest bidder when their bid was not accompanied by a bid deposit, but such deposit was furnished after the bids were opened.

It is our opinion that under an invitation for bids which requires bidders to submit bid deposits prior to the bid opening, the bid deposit requirement is a material part of the invitation which cannot be waived by the contracting officers.

A bid not accompanied by a bid deposit as required by the specifications cannot lawfully be accepted even though it is the lowest bid, and the required deposit is later furnished. *Albanese* v. *Marcheto,* 5 NJ Super, 605, 68 A2d 659; 42 Decisions of the Comptroller General 725, 38 Comp. Gen. 532.

The bid should be rejected as non-responsive to the invitation, and the check returned.

DEVIATION IN BIDDING PROCEDURE

(Purchasing Agent—C. F.—January 11, 1968)

Transmitted herewith is our opinion, which was requested by you in the attached memorandum, concerning the validity of the low bid submitted in the above-cited matter.

We have examined the objections filed by the second lowest bidder, namely that the low bidder's proposal was allegedly non-responsive to bidders' requirements of the City in that the low bidder submitted only one copy instead of three copies of his bid, and that therefore the second low bidder should be awarded the contract in question.

This problem has arisen before and we have ruled that the City may legally waive any deviation in the bidding procedure which has no effect on either the price, quantity or quality of the articles offered, and does not otherwise go to the substance of the bid or prejudice the rights of other bidders.

We cite the opinion in 43 Comp. Gen., 382-385, as support for our decision but suggest that the City still should require said low bidder to submit three copies of his bid offer, as required.

STATUS OF COMMUNICATIONS RECEIVED AFTER BID OPENING

(Purchasing Agent—R. L. C.—September 26, 1968)

This office is in receipt of your recent letter requesting our opinion as to the status of a communication received subsequent to bid opening from one of the bidders which attempts to clarify and/or combine alternative purchase plans contained in its bid document.

The facts as they appear in your letter or file are briefly as follows:

1. Advertised bids were requested for a computer system for the Police Department on a "Lease Basis or Lease with Purchase Option or Outright Purchase".

2. Bids were received from IBM and from RCA with RCA being the apparent low bidder on the "Lease Basis" and IBM being the apparent low bidder on the second and third alternative (i.e., Lease with Purchase Option and Outright Purchase).

3. The financial considerations applied to these facts by the Superintendent of Police resulted in a determination (Conlisk to Ward letter 7/9/68) "that direct purchase (alternate plan #3) was obviously out of question", and that the "down payment" provisions, standard in the Lease with Purchase Option contract of low bidder (IBM) on alternate plan #2, similarly could not be financed within the Department's present budget limitations.

4. Superintendent of Police recommended to the Purchasing Agent (Conlisk to Ward letter 6/21/68) that the contract be let under Lease Basis (alternate plan #1) to RCA the apparent low bidder under that plan.

5. On June 28, 1968, IBM wrote to Superintendent Conlisk to point out that the "down payment" proviso of their Lease with Purchase Option Agreement (alternate plan #2) under which they were the apparent low bidder need not be a cash payment, which apparently causes the Police Department financial difficulties, but could be an earned credit coming out of one year straight lease preceding the execution of the Lease with Purchase Option Agreement.

6. In an apparent belief that this suggested avenue was permissible, the Superintendent again wrote the Purchasing Agent (July 9, 1968) asking that his letter of June 21, 1968, recommending RCA on the Lease Basis be "disregarded" and that the "Lease/Installment Payment Plan as outlined" by IBM be utilized as the vehicle in procuring IBM equipment.

7. RCA, by letter of July 17, 1968, to the Purchasing Agent, taking note of the above states: "We under stand they (IBM) have been allowed

to combine their plans to present a better financial picture for their equipment. We assume we have the same opportunity and below you will find our costs under a comparable plan. . . . This figure gives RCA a $14,737.00 advantage."

IBM's letter of June 28, 1968, is not a clarification of its original bid on any one of the three alternative plans solicited but is, in fact, an attempt to overcome the "down payment" provision contained in its bid under Lease with Purchase Option Plan (alternate plan #2). The Comptroller General of the United States, in ruling on a somewhat analogous fact situation, has stated:

"A bidder may not be allowed to explain his meaning when he is in a position thereby to prejudice other bidders or to effect the responsiveness of his bid. Such action would serve to undermine the integrity of the bidding system and cause overall harm to the system of competitive bidding despite the possibility of an immediate advantage gained by a lower price in a particular procurement." (45 Comp. Gen. 800 at 804).

The solution suggested by IBM is, in fact, a combination of plan #1 "Lease Basis" under which they were the high bidder and plan #2 "Lease with Purchase Option" under which they were the apparent low bidder and is not, in fact, responsive to the solicitation. ". . . the prohibition against alternate bids forbids consideration of bids *which offer something other than that which is called for* by the specifications" (33 Comp. Gen. 499 at 500).

The special conditions provision of the bid document reads as follows:

"The Purchasing Agent reserves the right to award a contract *based on Table C-1, 2 or 3* when in his opinion the best interests of the City will be served."

At page 4 of the Detail Specifications the following direction is given:

"State and explain each of the procurement plans that your company offers as they relate to this proposal. Attach a copy of your contract for each type of procurement plan."

The language of both of these provisions is clear and unambiguous. Both bidders responded in a manner which indicates clearly the cost to the City of their computer system and the terms of their contract applicable thereto *under each of the three plans.* Any award which is made must be within the framework of the solicitation and cannot be awarded under terms, formula or arrangements which are foreign to the bid document.

"To permit public officers to accept bids not complying in substance with the advertised specifications or to permit bidders to vary their proposals after the bids are opened would soon reduce to a farce the whole procedure of letting public contracts on an open competitive basis" (17 Comp. Gen. 554 at 558).

This being the case, you should disregard IBM's letter of June 28, 1968, as well as RCA's of July 17, 1968, and "award a contract based on Table C-1, 2 or 3 when in (your) opinion the best interests of the City will be served by such action". If, in your opinion, the best interest of the City is served by *not* making an award you are, of course, free to disregard all bids and to solicit new bids by readvertisement.

WITHDRAWAL OF PROPOSALS BY BIDDERS

(Truck and Fleet Manager, Grand Spaulding Auto Sales, Inc.—K. R. B. —November 20, 1968)

Your letter dated November 4, 1968 addressed to Mayor Daley's Grievance Committee, has been referred to this department for review.

There are two pertinent provisions in the Contract for Supplies. First is number 6 "Withdrawal of Proposals;" there it states:

"Bidders may withdraw their proposals at any time prior to the time specified in the advertisement as the closing time for the receipt of bids. However, no bidder shall withdraw or cancel his proposal for a period of sixty (60) calendar days after said advertised closing time for the receipt of proposals nor shall the successful bidder withdraw or cancel or modify his proposal after having been notified by the Purchasing Agent that said proposal has been accepted by the City.

"Where this contract shall be approved by another agency, such as the Federal Government or State of Illinois, then the bidder shall not withdraw or cancel or modify his proposal for a period of ninety (90) days after said advertised closing time for the receipt of proposals."

Secondly, is number 11 "Failure to Furnish Bond" and there it states:

"In the event that the bidder fails to furnish the performance bond in said period of thirteen (13) calendar days after acceptance of the bidder's proposal by the City, then the bid deposit of the bidder, or the amount of the Comptroller's Certificate, as the case may be, shall be retained by the City as liquidated damages and not as a penalty, IT BEING NOW AGREED that said sum is a fair estimate of the amount of damages that said City will sustain due to the bidder's failure to furnish said bond."

On March 6, 1968 the advertisements for bids was placed. The bids were opened on March 27, 1968 and you were the low bidder. On April 18, 1968 the Purchasing Department notified you that you were awarded the contract. You could not withdraw or cancel your proposal for a period of sixty (60) days after advertised closing time nor could you withdraw or cancel or modify your proposal after being notified by the Purchasing Agent that said proposal has been accepted by the City. On April 24, 1968 you attempted to withdraw your bid. This was within sixty days after the advertising closing time and the City had also accepted your proposal. You were, therefore, bound to the proposal as made originally.

The other provision relates to the bid deposit. In the event the bidder fails to furnish the performance bond in said period of thirteen (13) calendar days after acceptance of the bidder's proposal by the City, then the bid deposit shall be retained by the City as liquidated damages. You failed to provide the performance bond; therefore, the bid deposit of $800.00 was forfeited.

These provisions are not intended to be harsh, but to encourage firm binding proposals by bidders. A bidder has the responsibility of making certain its bid is competent and free from error. (See Massman Constr. Co. 1. U.S. 102 Ct. Cl. 699).

WITHDRAWAL OF BID AFTER OPENING

(Purchasing Agent—K. R. B.—November 19, 1968)

Pursuant to your request, a review of the file submitted has been made in the above cited contract.

At issue is a $16,000.00 dollar bid deposit submitted by Tri-City Electric Company. Tri-City Electric Company submitted a bid on the proposed project along with the bid deposit. On June 21, 1968, the bids were tabulated and Tri-City Electric Company was the low bidder. July 1, 1968, Tri-City asked to withdraw their bid.

There are two pertinent provisions in the contract. First, is the clause covering liquidated damages on page R-2, paragraph 12. It provides that the City of Chicago shall retain the bid deposit of the bidder in the event the bidder fails to furnish a performance bond thirteen (13) days after acceptance of the bidder's proposal. Second is paragraph 7 on page R-2 relative to withdrawal of bids. There, the clause provides that a bidder shall not withdraw or cancel his proposal for a period of sixty (60) calendar days. Also, the bidder shall not withdraw or cancel or modify his proposal after being notified the City has accepted the bid.

Once Tri-City submitted their bid, they could not withdraw that bid for a period of sixty (60) calendar days from the closing date for receipt of bids or by acceptance of the bid by the City of Chicago.

July 1, 1968, the City accepted the bid, therefore both events took place and Tri-City Electric Company, was bound to the contract.

Massman Constr. Co. v. U.S. 102 Ct. Cl. 699, develops this question of withdrawing a bid. There the court said . . . . "It is necessary that bids be firm bids, backed by a guaranteed willingness to sign a bid at contract price. To have a set of bids disregarded after they are opened and each bidder has learned his competitors price is a serious matter, and it should not be permitted except for cogent reasons. Plaintiff should not be released from liability upon its bid bond, since one of the purposes of the bond was to cause bidders to exercise due care."

Tri-City then raises the issue of honest mistake. In Saligman v. United States 56 F. Supp 505 the law stated is, "Ordinarily no relief will be granted to a party to an executory contract in the case of unilateral mistake. In such case when a bid has been accepted the bidder who has made a mistake will be bound and must bear the consequences thereof, however, if the party receiving the offer or bid, knows or has reason to know because of the amount of the bid or otherwise, that the bidder made a mistake 'the contract' is voidable by the bidder." The Department of Purchasing received a letter from the Chicago Transit Authority indicating the bid of Tri-City Electric Company was $137,000.00, over the estimate they had compiled. Also, Public Works stated in a letter, "this bid is reasonable and we recommend that you take the necessary action to award a contract." Based on both letters, the Purchasing Department would have no reason to know the bidder made a mistake.

A subsequent case, Hyde Park Clothes v. U.S. 84 F. Supp. 589 involved the misreading of specifications. There the court said, "A manufacturer which negligently failed to notice provision in invitation to bid for contract made a miscalculation in the bid is not entitled to additional allowance." Referring to Part 2 Detail Specifications Page DS-21 Telephone Cable-11-101-102 Pairs it states in the first sentence, "Telephone cable, lead covered, paper insulated." This is a clear and unambiguous description of cable to be used on the projected job site. It was due to the inadvertence or negligence of Tri-City Electric Company, this was not read correctly resulting in an error in their bid. A succinct statement is made in Miller v. Wilmingstar Housing Authority 179 F. Supp. 206, "A bidder is presumed to have read specifications upon which he bid."

It is the opinion of this department that the $16,000.00 bid deposit stand forfeited.

EFFECT OF MISTAKE

(Purchasing Agent—F. P. K.—December 18, 1970)

We are in receipt of your letter of December 10 with which you submit a letter from B.F. Goodrich Company requesting that they be allowed to withdraw their bid because of obvious error.

In an opinion rendered July 9, 1962 this office described the five requirements necessary for equitable recission as follows:

(1) The mistake must be material and substantial. A bid of $7.50 each on used tires claimed as an error which should have been $7.50 for the entire lot of used tires is material and substantial. The next highest bid was 2¢ per tire.

(2) The mistake must have been palpable. Palpable errors in price bid are such that a conscientious and experienced bid evaluator should have known upon an examination that an error has been made. The Purchasing Agent and those to whom primary bid evaluation is delegated by him are charged with a knowledge of the "market price" of items to be sold. If the

alleged error is to be considered palpable it must be of such consequence that it is evident on the face of the bid. Since you state that the subject tire carcasses have a very minimal salvage value, this was evidently the case.

(3) No neglect of legal duty to exercise ordinary care and diligence. If it is determined factually that even with the exercise of ordinary care and diligence, the claimed error was made innocently, the requirement has been met.

(4) Enforcement would be unconscionable. It is quite evident that it would be unconscionable to the contractor to suffer such a great out-of-pocket loss in performance of the contract.

(5) The other party must be placed in status quo. Allowing a withdrawal of the bid would place the City in a position of rejecting all bids, and it would be in status quo, but for the expense of a further advertisement.

In the light of the foregoing and our opinion July 9, 1962, and June 6, 1962 it is our opinion that the bid in question can be withdrawn without pecuniary loss to the bidder since the requirements for equitable recission are met.

REFUND OF BID DEPOSIT FOR MISTAKE

(Purchasing Agent—K. R. B.—January 17, 1969)

Pursuant to your request, this department has reviewed the above cited contract, the bid proposals submitted on said contract, and the letter of withdrawal from South Side Ford Truck Sales, Inc., dated November 7, 1967 requesting cancellation on Bid #22-67-213.

Moffett Hodgkins & Co. v. Rochester 178 U.S. 373 develops the criteria for withdrawing a bid due to honest mistake. There the court stated three (3) points governing mistake:

1. That there was no doubt of the mistake on the part of the company;

2. That there was a prompt declaration of it as soon as it was discovered;

3. That when this was done the transaction had not reached the degree of a contract.

Furthermore, the court said, "the party alleging a mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt on the mind of the court as to either of these points."

A subsequent case 42 Comp. Gen 723 Ramirez Enterprises under invitation for bids No. AIV-41-093-63-5, further develops points by stating, "It is settled law that a bidder under an advertised Federal invitation for bids may not modify or withdraw its bid after bids have been opened. Refining Associates, Inc. v. United States, 109 F. Supp. 259. It has been held, however, that where the public body as here is on notice of error in a bid which has been submitted, acceptance of that erroneous bid will not result in the formation of an enforceable contract. For this reason, it has been a long-standing practice in Federal Procurement to permit withdrawal of a bid upon convincing proof of error therein."

Chapter 24—Municipal Code Division 10 Ill. Rev. Stat. pertains to Purchasing and Public Works Contracts in cities of more than 500,000. It does not provide for withdrawal of bids under competitive bidding. There is a provision in the contract for supplies providing for withdrawal of bids. On page R-2, withdrawal of proposals, it states:

"Bidders may withdraw their proposals at any time prior to the time specified in the advertisement as the closing time for the receipt of bids. However, no bidder shall withdraw or cancel his proposal for a period of sixty (60) calendar

days after said advertised closing time for the receipt of proposals nor shall the successful bidder withdraw or cancel or modify his proposal after having been notified that said proposal has been accepted by the City."

The letter from South Side Ford Truck Sales, Inc., requesting cancellation of their bid due to error, is dated November 7, 1967 the closing day for receipt of bids. The letter was not received until November 8, 1967, in the Purchasing Department, therefore, the above stated provision was applicable to the bid proposal. The rule in delivery of letters being, the withdrawal of a bid "is not final until the letter reaches its destination, since the sender has the absolute right of withdrawal from the post office, and even the right to have the postmaster at the delivery point return the letter at any time before actual delivery." Rhode Island Tool Company v. United States 130 Ct. Cl. 698.

That raises the issue of whether or not the case law as developed toward withdrawal of bids is applicable to the bid proposal of South Side Ford Truck Sales, Inc.

The tabulation of bids opened on November 7, 1967, indicates South Side Ford Truck Sales, Inc., bid was $4,488.60, Schuster Equipment Co., bid was $5,716.91, Litsinger Motor Co., bid was $5,760.00, Milo Brooks, Inc., bid was $5,846.00, and International Harvester's bid was $5,999.17.

In evaluating the five bids submitted, there is a discrepancy of $1,228.31 between the bid of South Side Ford Truck Sales, Inc., and the second low bidder, Schuster Equipment Co. The difference is $1,510.57 between South Side Ford Truck Sales, Inc., and the highest bid of International Harvester. The letter from South Side Ford Truck Sales, Inc., is dated November 7, 1968 admitting to an error when transferring the figure to the bids. The figure should have read $5,488.60.

This letter put the City of Chicago on notice promptly of a mistake in their bid. A contract had not yet been consummated and the difference in the bid of South Side Ford Truck Sales, Inc., and the other four bids, indicates convincing proof of an error. The other bids were grouped together with a difference of $282.26 between the second low bidder and the highest bidder, where there was a variance of $1,510.57 between South Side Ford Truck Sales, Inc., bid and that of the high bidder. It should also be noted that the Purchasing Department did not accept the bid of South Side Ford Truck Sales, Inc. The contract was awarded to Schuster Equipment Co., the second low bidder.

It is the opinion of this department that, as stated in your letter, the error appears to be one for which they should receive relief. The bid deposit of $300 should be returned.

CHANGES IN GENERAL CONDITIONS AFTER AWARD

(Commissioner of Public Works—R. L. H.—January 25, 1971)

Your letter and attachments of January 18, 1971, requests our opinion as to the change requested in the General Conditions by the insurance broker for the successful contractor.

Please be advised that no changes in a General Condition can be made after award of the contract which in any way will change the basic terms of the contract to the city's detriment. If a change is requested, the request should properly come to the Purchasing Agent prior to bid opening such that if the change is agreed to, all prospective bidders will have the same benefit.

The letter attached to your request from the insurance broker states quite clearly that the requested change would ". . . limit the contractor's liability and that of his insurance company . . .", a change which would definitely be a detriment to the City since it would be limiting the liability as set forth in the contract documents as bid and give this contractor an unfair advantage over any other prospective bidders or actual bidders on this specification.

It is our opinion, therefore, that the requested change cannot be made.

SOLE SOURCE PROCUREMENT

(Commissioner of Public Works—J. E. S.—November 22, 1967)

Your recent letter requested whether or not procurement of baggage handling units at Chicago Midway Airport could be accomplished as sole source procurement under Section 8-10-4 of the Municipal Purchasing Act.

In view of the fact that one of the proposals discussed in your letter has already been reviewed by two manufacturers of the equipment, it is our opinion that competitive bidding would be necessary and we would take no legal objection to use of a detailed catalogue type specification on an "or equal" basis. Assuming that the carousel units discussed are likewise manufactured by others, the same procedures would likewise be acceptable. However, if it may be factually determined that Matthews is the only manufacturer of the desired type then, in that instance, the sole source provisions of Section 8-10-4 may be utilized.

WAIVER OF DEVIATION FROM "SUBLETTING AND ASSIGNMENT" CONDITION

(Purchasing Agent—C. F.—October 17, 1967)

Transmitted herewith is our opinion concerning the validity of the above-cited contract proposal after examining memoranda provided by you to this department, dated September 27, 1967, and October 17, 1967, respectively, in response to this department's request for clarification of certain contract aspects, contained in our letter of September 25, 1967.

We now are satisfied that said contract proposal, despite a deviation from the City's provisions contained in the section in Special Conditions entitled "Subletting and Assignment" on page SC-12, is in accord with the terms of the invitation to bid and that the deviation in the low bid, submitted by the above-cited bidder, would not give that bidder a material advantage over others who may or may not conform to the terms of the invitation.

We also agree that the City may legally waive the aforesaid deviation because it is our opinion that it has no effect on either the price, quantity or quality of the proposed contract offer.

We refer you to a recent decision of the Comptroller General of the United States involving an analogous situation which stated:

> "The question as to whether deviations from the requirements of advertised specifications might be waived after the opening date has been before this Office many times; and it has consistently held that such deviations may be waived provided they do not go to the substance of the bid or work an injustice to other bidders. In other words, the primary question for determination in this and similar cases is whether the deviation proposed to be waived goes to the substance of the bid so as to affect either the price, quantity or quality of the articles offered and therefor is prejudicial to the rights of other bidders or is merely a matter of form or some immaterial variation from the exact requirements of the specifications such as would not affect either the price, quality or quantity of the articles offered." (See 43 Comp. Gen., 382-385.)

Subject to the propriety of accounting charges, it is our opinion that this will be a binding and valid contract when signed by the Purchasing Agent, the City Comptroller, and the Mayor.

Our approval as to form and legality has been indicated thereon.

Section B. EXECUTION AND INTERPRETATION

ASSIGNMENT vs. SUBCONTRACT OF A PROPOSED PROFESSIONAL SERVICE CONTRACT

(Mayor's Office For Senior Citizens—R. L. H.—March 16, 1973)

Your letter of March 9, 1973, requests our opinion as to whether or not part of a proposed professional services contract to be entered into with Kirschner Associates, Inc., can be assigned by said contractor to a wholly owned subsidiary rather than requiring the said contractor to enter into a subcontract for said work.

The implication of an assignment of a contract, be it in part or as a whole, is that the assignee then falls, into the shoes of the assignor and comes into a privy relationship with the other party to the contract, in this case, the City. When we enter into a professional services contract with a contractor, it is our understanding that said contractor is the only party with whom we come in direct contact such that an assignment which is here suggested would change this relationship.

We believe that a contractor, by proper language in a subcontract, can exercise more control over a subcontractor than be can exercise by virtue of an assignment of part of the original contract. The sole responsibility for performance of the contract would remain with the contractor and there would not be any secondary parties to whom the City would have to look for proper performance.

As a general rule, in addition to the foregoing, assignment is frowned upon and subcontracting is accepted.

It is therefore our opinion that assignment of part of the aforesaid contract would not be desirable and that the contractor should proceed with the subcontract procedure.

PAYMENT OF MONIES RESERVED TO INSURE CONTRACT COMPLIANCE

(Purchasing Agent—K. R. B.—March 4, 1969)

Pursuant to your request, a review of the letter from Contracting and Material Company in the above cited matter has been made.

Chapter 26-13 of the Municipal Code of Chicago states:

"26-13. Every contract for any public improvement or other work shall provide that certain percentages, in accordance with the table set out below, shall be reserved out of the monies earned upon such contract to insure the proper performance of the work covered thereby and a full compliance with the provisions of the contract, and such percentages shall not be payable until such contractor shall satisfy the purchasing agent that all subcontractors, workmen and employes have been fully paid, and that the work covered by such contract has been fully completed in accordance with the provisions thereof:

10% of each monthly payment estimate covering the first 50% of the work shall be held until completion of the work covered by the contract; Upon completion of the work and prior to computation of the final quantities, 2% of the total amount of the contract shall be retained out of said aforementioned reserve, and the balance released to the contractor; Upon computation of the final quantities of work, said retained 2% shall be paid in final payment."

[Passed. Coun. J. 11-3-47, p. 144; amend. 6-11-58, p. 7822.]

Section 4 entitled, "Payments," on pages C-5 to C-7 of the contract is not in variance with the provisions of the ordinance. The language is clear and unequivocal in both the contract and ordinance. Both state, "upon computation of the final quantities of work said retained 2% shall be paid in final payment." The 2% reserve cannot be paid out piecemeal, but only in its entirety upon computation of the final quantities of work.

It is the opinion of this department that the request for $100,000.00 of the reserve is not authorized by the language of both the cited ordinance and the contract proper.

"COST-PLUS" CONTRACTS

(Purchasing Agent—C. F.—February 15, 1968)

Transmitted herewith is the above-cited contract without action by this Department.

An examination of the contract provisions discloses that under the section entitled "Extra Work" in General Conditions, pages 9 and 10, three alternatives for payment are enumerated, including subsection (c) which offers to make such payment on a "cost-plus-limited basis not to exceed a specified limit." The said subsection continues:

> "A cost-plus-limited basis shall be interpreted to mean the cost of labor, materials and insurance, plus 15 percent of those parts as may be agreed upon of such costs, to cover superintendance, general expenses and profit."

We have been unable to find any express or implied authorization in the Illinois Revised Statutes (1967) which permits municipalities to engage in cost-plus contracts and in the absence of such special state legislation or authorization by charter, municipal corporations "probably may not legally employ a 'cost-plus-a-fixed-fee' or a 'cost-plus-a-percentage-of-cost' contract." (See Rhyne, Municipal Law, Section 10-15, page 270 (1957)).

A contract similar to a cost-plus contract, but providing that actual cost plus the fee would not exceed a stipulated amount has been held not to be a cost-plus contract, but a "guaranteed maximum cost" contract and acceptable.

However, the aforementioned subsection (c) fails to stipulate a guaranteed maximum cost, referring vaguely to ultimate cost that "may be agreed upon."

Promises must be definite and certain to constitute sufficient consideration for each other and support a contract, and a promise may be too vague and uncertain to amount to a consideration for the promise made to the other party. (See Corpus Juris Secumdum, Section 98, pages 784-785 (1963)). This legal premise surely is applicable in the matter at hand.

Furthermore, we find that the section in General Conditions entitled "Forefeiture of Contract" on page 7 conflicts with provisions embracing the same subject matter in Section entitled "Default" in General Conditions, page G-3.

Since our primary objections concerning costs go to the substance of the proposed contract, we are unable to advise amendments and suggest that a new invitation for bids be undertaken, after revision of the basic contract documents.

CAPITAL LOAN AND GRANT CONTRACT

(Administrative Assistant to the Mayor—E. L. N.—November 19, 1968)

Our office has reviewed the above referenced contract transmitted herewith. The original request by your office was to review the possibility of accomplishing this Project without the necessity of complying with the provisions and require-

ments of the Urban Renewal Consolidation Act. A complete analysis has been made, conferences held with the Federal Government, and it is our opinion that the City of Chicago has the power to accomplish the objective of a Project only by virtue of the powers granted by the Legislature in the provisions of the Urban Renewal Consolidation Act.

Therefore, the contract transmitted herewith is in proper legal form for execution by the Mayor of the City of Chicago, who was authorized to execute said contract by Ordinance of the City Council of the City of Chicago passed December 20, 1967. The Department of Housing and Urban Development, however, will require an additional Ordinance authorizing the execution by the Mayor of this specific Contract which has been prepared by this office. It will be necesary for you to forward the new Ordinance together with the Contract to satisfy the Federal Government requirements. It should be specifically noted, however, that the Corporation Counsel's office will be unable to give a Certificate indicating that the City has the legal right to proceed with this Project until the following conditions, which are contained in the Contract (See Section 8, *Special Conditions*) have been complied with:

1. Determination by the Department of Urban Renewal that the Area within which the facility will be located is a "slum and blighted area" within the provisions of Chapter 67½ Sec. 91.103 (i)

2. Designation by the Department of Urban Renewal that the Area is a "slum and blighted area" (Chapter 67½ Sec. 91.111)

3. Approved by the City Council of the City of Chicago of the designation of the area as a "slum and blighted area" (Chapter 67½ Sec. 91.111).

In conclusion, we wish to emphasize that the Contract, although approved as to form, grants conditional authority to proceed with the project and can only be effective when the aforesaid conditions have been accomplished.

GENERAL CONDITIONS FOR CONSTRUCTION CONTRACTS

(Commissioner of Public Works—Purchasing Agent—R. L. H.—June 22, 1972)

Pursuant to your letter of February 29, 1972, we have made a comprehensive study and analysis of the above cited booklet and, for the most part, believe that the members of your engineering and architectural staffs have produced a fine document. We note that many of the suggestions made by the office in the past have been incorporated therein.

As a general comment, we do not believe that these General Conditions should be included in *all* construction contracts but should be limited to those contracts having an estimated expenditure of a substantial sum. We believe that if this booklet were attached to a $5,000.00 contract, for example, some prospective bidders may be scared off on the basis of the weight of the documents and others may bid higher than they ordinarily would intend to make sure that they are covered for all of the conditions therein set forth. We suggest that members of your staff meet with members of the staff of the Purchasing Agent to determine when these General Conditions will be included.

As a further general comment, we suggest that all references to the Illinois Revised Statutes indicate the latest or 1971 edition rather than the 1967 edition contained in these General Conditions.

The following comments are our specific comments and recommendations on each of the paragraphs of the General Conditions where comment was deemed necessary.

Paragraph 101.2. The definition of ADDENDUM should be revised to read as follows: "Written interpretation or modification of any of the Specifica-

tions and Contract Documents and/or plans which will be mailed or delivered to prospective bidders."

Paragraph 101.3. The definition of BIDDER should be revised to read as follows: "An individual, partnership, firm, company or corporation submitting a proposal for the work contemplated.

Paragraph 101.10. The definition of EXTRA WORK should be revised such that the sentence ends with ". . . as determined by the Purchasing Agent and/or the Commissioner."

Paragraph 102.3. *Indemnity.* The words ". . . or of the City of Chicago or its employees . . ." appearing on the 8th and 9th line of this paragraph must be delected pursuant to Chapter 29, Section 61, 1971 Illinois Revised Statutes which provides that agreements to indemnify for one's own negligence are against public policy.

Paragraph 102.5. *Soils Information etc.* We note that although this clause has been in effect for sometime, we still see requests for contract modifications based upon variations in subsurface conditions. If this paragraph is not to be conclusive and operative, we do not need it.

Paragraph 102.8. *Non-Discrimination.* We suggest that this entire paragraph be eliminated in its present form and the paragraph entitled "Non-Discrimination" as attached hereto be substituted therefor.

Paragraph 102.9. *Wages* refers to copies of prevailing wage rates being on file with the Purchasing Agent. To the best of our knowledge no such rates are currently on file or have ever been on file with the Purchasing Agent. Unless copies of same are made available to the Purchasing Agent, the reference to location "on file" should be changed to reflect the actual facts.

Paragraph 102.11. *Subletting* etc. We suggest the insertion of the word "prior" between the words "the" and "written" on the 5th line of page 15.

Paragraph 102.15. *Partial Utilization.* We suggest that the word "Commissioner" be substituted for the words "Purchasing Agent" in the 7th line of this paragraph since the certificate of agreement referred to therein contains matters which are solely in the knowledge of the Commissioner.

Paragraph 103.2. *Proprietary Products.* We do not believe this paragraph is necessary since paragraph 15 of the current Requirements for Bidding and instructions to Bidders basically covers the same area.

Paragraph 103.3. *Contract Modification.* We suggest the words "however" and "promptly" be taken out of the last line on page 25.

Paragraph 103.6. *Work by Contractor's Organization.* It appears that this paragraph may be eliminated more often than not and believe, therefore, that if it is to be included at all, it should be as a Special Condition of a particular project rather than a General Condition of all projects. We suggest, therefore, that this paragraph be eliminated from the General Conditions.

Paragraph 104.1. *Authority of the Commissioner.* We suggest that the following clauses appearing on lines 3 to 6 inclusive be eliminated: ". . . quality and acceptability of materials furnished . . .", "interpretation of the Plans and Specifications". We further suggest that the entire second paragraph be eliminated since the matters therein contained are adequately covered by the Default clause, paragraph 102.14.

Since the booklet submitted to us for review did not contain a page 33, we are not in a position to comment on paragraph 104.7 or the beginning lines of paragraph 104.8 appearing on said page.

Paragraph 104.11. *Safety Precautions.* Since we cannot understand what is intended to be covered in the clause ". . . to avoid contingencies which may delay the completion of the work." We suggest that the first sentence of this

paragraph be revised to read as follows: "The Contractor shall take every precaution necessary to render all portions of the Work secure in every respect and to decrease the possibility of accidents from any cause."

Paragraph 105.2. *Effective Date etc.* Since Contractors are being notified of the effective date of Contracts by submission of a signed copy of the Contract and "Contract Notices" are no longer being utilized, we suggest the deleting of the second sentence of this paragraph.

Paragraph 105.5. *Suspension of Work.* We suggest the deletion of the last three lines of this paragraph on page 45 beginning with the word "except".

Paragraph 106.1. *Payment to Contractor.* Since the Purchasing Agent does not now give approval for release of reserve down to the 2% referred to in the last paragraph on page 47, we suggest that the words "and the Purchasing Agent" appearing in said paragraph on said page be deleted.

Paragraph 106.5. *Payment for Extra Work.* Our review of this paragraph reveals a similarity to the existing Special Condition related to payment for changes and it is our opinion that the latter is more comprehensive and more acceptable. Unless there is a good reason for insisting on the paragraph as written, we suggest that the present paragraph of the Special Conditions be substituted therefor.

Paragraph 107.1. *Insurance Requirement.* Since the Purchasing Agent currently does not "approve" insurance coverages submitted by Contractors and has not been receiving copies of the policies of insurance or certificates of insurance from the Contractors, it is our opinion that the word "Commissioner" be substituted for the words "Purchasing Agent" in the first paragraph. We further suggest deletion of the words "as may be required by the Purchasing Agent" in the last line on page 58 carrying over to page 59.

Paragraph 107.2. *Types and Amounts of Insurance.* This is a question whether the amounts of insurance coverage required in sub-paragraphs 3 and 4 is a proper amount for all construction projects. If variations are to be made in specific projects by way of a Special Condition, it might be advisable to leave specific insurance requirements as a Special Condition and eliminate this paragraph (107.2) from these General Conditions. If this suggestion is approved, the words "by this section" appearing on line 2 of paragraph 107.1 should be deleted. In the event this suggestion is not approved, the words "and as approved by the Purchasing Agent." should be deleted at the end of sub-paragraphs 5 and 6. We also note that the reference to insurance covering special hazards in sub-paragraph 3 is extremely sparse as compared with all previous statements of this requirement.

Paragraph 109.1. *General Inspection.* We suggest that the words "in writing" be inserted into the last sentence of the first full paragraph on page 72 such that it will read as follows: ". . . he shall inform the Contractor in writing as to the particular defects. . . ." Since there may be other than Federal Government contributions to construction projects, we suggest that the last paragraph on page 72 and running over to page 73 be revised to read as follows:

> "When the contract includes work for which another governmental body is to pay a portion of the cost thereof, such work shall also be subject to inspection and approval by the representatives of said body, but such inspection and approval shall in no sense make the said body a party to the Contract."

Paragraph 110.5 *Substitute Materials and Equipment.* Since it is assumed that prospective bidders are supposed to check into the availability of materials and equipment prior to making a bid, we see no reason why a Contractor should be compensated for additional cost of substitute equipment or materials when it is determined at a later date that the equipment or materials are not available. This should be a Contractors cost exclusively. However, where the Contractor gets the benefit of a lower price, this reduction should be passed along to the City. We therefore suggest that the last full sentence on page 80 be revised to

read as follows: If any approved substitute material or equipment is ordered, the cost of which, as determined by the Commissioner and Purchasing Agent, is lower than the cost of the specified material or equipment or the specified alternate material or equipment, a reduction in the Contract price will be made to change the Contract price by such decrease in cost." Further, since there will be no additional compensation provided for, the words "and the amount of compensation, if any," appearing on the first line of page 81 should be deleted.

Paragraph 111.1 *Procedures and Methods.* We suggest that the words "in no wise" appearing in the 14th line on page 83 be deleted and the words "under no circumstances" be substituted therefor.

Paragraph 111.4. *Resident Engineer's Field Office.* Since a field office is not *always* required, we suggest that this paragraph be made a Special Condition in those projects where it applies.

INDEMNITY AGREEMENTS

(Commissioner of Public Works—J. K. M.—March 23, 1971)

In reply to your request for a proposed indemnity agreement executed by the contractor to protect the City of Chicago arising out of the City's consent to allowing the City tug "Versluis" to tow the contractor's construction barge, below we have drafted an indemnity agreement which I believe, if incorporated into the contract, will protect the City of Chicago.

"INDEMNITY

Contractor shall indemnify, keep and save harmless the City, its agents, officials and employees, against all injuries, deaths, loss, damages, claims, suits, liabilities, judgments, costs and expenses, which may in anywise accrue against the City in consequence of the City of Chicago using the City tug 'Versluis' to tow the contractor's construction barge from one location to another, or which may in anywise result therefrom, whether or not it shall be alleged or determined that the act was caused through negligence or omission of the Contractor or his employees, of the subcontractor or his employees, or of the City of Chicago or its employees, and the contractor shall, at his own expense, appear, defend and pay all charges of attorneys and all costs and other expenses arising therefrom or incurred in connection therewith, and, if any judgment shall be rendered against the City in any such action, the Contractor shall, at his own expense, satisfy and discharge the same. Contractor expressly understands and agrees that any performance bond or insurance protection required by this contract, or otherwise provided by Contractor, shall in no way limit the responsibility to indemnify, keep and save harmless and defend the City as herein provided."

LEGALITY OF CONTRACT

(Commissioner of Health—M. C. H.—September 24, 1969)

This is to acknowledge receipt of your letter in which you ask our opinion as to whether or not the proposed contract between the City of Chicago and the Associates in Radiology, at 1725 W. Harrison Street, is legal and in proper form.

Please be advised that Chapter 24, § 8-10-3 of the Illinois Revised Statutes (1967) provides as follows:

> "8-10-3. Purchase orders and contracts—Competitive bids. § 8-10-3. Except as otherwise herein provided, all purchase orders or contracts of whatever nature, for labor, services or work, the purchase, lease, or sale of personal property, materials, equipment or supplies, involving amounts in excess of $2,500, made by or on behalf of any such municipality, shall be let by free and open competitive bidding after advertisement, to the lowest responsible bidder, or in the appropriate instance, to the highest responsible bidder, depending upon whether such municipality is to expend or to receive money. * * *"

We also find the following provision in Chapter 26-1 of the Municipal Code of the City of Chicago:

> "26-1. There is hereby established an executive department of the city which shall be known as the department of purchases, contracts and supplies. The head of the department shall be the purchasing agent, whose appointment, powers, functions, duties and obligations are provided for by the 'The Municipal Purchasing Act for Cities in excess of 500,000 population' approved July 21, 1947, being Article 22A of the 'Revised Cities and Villages Act' of the State of Illinois, approved August 15, 1941, as amended."

* * *

In view of the fact that the City of Chicago is to furnish the money to pay the Associates in Radiology, it is our opinion that the above mentioned contract should be directed to the Purchasing Agent of the City of Chicago.

LIEN AGAINST PUBLIC FUNDS—PROCEDURE

(Modenco Corporation—R. L. H.—January 20, 1971)

Your letter of January 12, 1971, in the above entitled matter addressed to the Corporation Counsel has been referred to the undersigned for reply.

Please be advised that we have checked our records and find no current litigation between the City and Walsh Brothers such that this cannot be the reason why your claim has not as yet been settled.

Our examination of the records does reveal, however, that you filed a Notice of Claim for Lien with the City in March, 1970, and that no lawsuit was filed by you to perfect said lien. Our records also indicate that your attorneys sent a letter demanding payment subsequent thereto and said letter was treated as a second Notice of Claim for Lien. Again, however, no action was filed in the Court to perfect the lien.

Chapter 82, Section 23, of the Illinois Revised Statutes sets forth the procedures whereby a subcontractor of a contractor engaged in a public works project for a governmental body may claim a lien against public funds allocated to said contractor on said public works project. The statute provides that a Notice of Claim for Lien must be filed with the public body with a copy to the contractor and the public body must withhold the amount claimed in said lien for a period of sixty days. During this sixty day period, the claiment/subcontractor must perfect its lien by filing an action for an accounting in court against the contractor and serve a certified copy of the Complaint on the public body. Upon receipt of the certified copy of the Complaint, the public body must then continue to withhold the monies withheld until termination of the court action or direction of the Court. Failure to perfect the lien by filing a court action within sixty days after the Notice of Claim for Lien is filed terminates the public body's responsibility to withhold the monies claimed and same can be released to the contractor.

We have been advised that there are still sufficient monies being withheld from Walsh Brothers to cover the amount of your claim, but since more than sixty days have elapsed from the filing of your Notice, a new Notice of Claim for Lien will be necessary and a lawsuit must be filed within sixty days thereafter.

The Illinois law is quite settled regarding liens of subcontractors on public works projects such that complete adherence to the statutory provisions is required for disposal of the lien claim. The only alternative to your following the above procedure is to settle the matter directly with Walsh Brothers.

PERFORMANCE BONDS

(Commissioner of Public Works—J. E. S.—June 14, 1968)

Your recent letter requested that this department advise whether or not a bond guaranteeing the return of any funds paid to the contractor in the event a court enter judgment in a sub-contractor's suit arising out of the above contract would permit release of final payment.

Be advised that Section 26-13 of the Municipal Code of Chicago reads as follows:

"26-13. Every contract for any public improvement or other work shall provide that certain percentages, in accordance with the table set out below, shall be reserved out of the monies earned upon such contract to insure the proper performance of the work covered thereby and a full compliance with the provisions of the contract, and such percentages shall not be payable until such contractor shall satisfy the purchasing agent that all subcontractors, workmen and employes have been fully paid, and that the work covered by such contract has been fully completed in accordance with the provisions thereof:

10% of each monthly payment estimate covering the first 50% of the work shall be held until completion of the work covered by the contract; Upon completion of the work and prior to computation of the final quantities, 2% of the total amount of the contract shall be retained out of said aforementioned reserve, and the balance released to the contractor; Upon computation of the final quantities of work, said retained 2% shall be paid in final payment.

Under the facts and circumstances of this matter and in view of the above cited section of the Municipal Code it is not apparent to this department how the request of the contractor could be acceded to.

PERSONAL SERVICE CONTRACTS—FORM

(Commissioner of Health—A. H.—January 25, 1968)

We have examined the Agreement proposed to be executed between the Board of Health of the City of Chicago, as Agent of the Illinois State Department of Public Health, and Clyde A. Young, O.D., an individual optometrist, and herewith return the same to you not approved as to form and legality for the following reasons:

1. A contract should have each page, except, perhaps the last, substantially filled, so as to avoid possible inclusion at a later time of matters not contemplated by the contract (referring to page 5).

2. There is an absence of any limitation in lump sum form with respect to the total amount of money to be expended under this contract, as such limitations have previously appeared in other such contracts, see, *e.g.,* to Children's Memorial Hospital Contract, Paragraphs 5 and 9.

3. The Contractor is an optometrist and we therefore question whether the use of the words "ophthalmologic" in Paragraph 1-A and "ophthalmologist" in Paragraph 2 accurately reflect what is intended by this contract.

4. The legends and forms above the signature lines should appear in the same form and order as they appear in previous contracts. Also, the jurat should be entirely omitted, as it is unnecessary. We refer you, as an example, to the recent contract between the Board of Health and the Children's Memorial Hospital for the proper signature forms and legends to which we have referred.

CHARGE FOR UNUSED SEWER SERVICE

(Department of Water and Sewers—J. M. K.—August 14, 1967)

In reply to your letter requesting an opinion as to whether or not persons whose homes were damaged and destroyed by the recent tornado should be charged for sewer service, when such service was not used, it is our opinion that no charge should be assessed towards said homeowers.

Our opinion is based upon principles of contract law, that excuses a person from his obligation to pay under the terms of a contract when, from the nature of the contract, it is evident that the parties contracted on the basis of the continued existence of certain things or a state or condition of things to which it relates. Applied to the present situation, it is evident that these persons agreed to accept and pay for our sewer service upon the condition that their home existed or said sewer service was needed in the ordinary and customary habitation of a home.

Since their homes were either destroyed or damaged beyond use, it can reasonably be applied that under this condition the homeowners would not contract for sewer service and thus their performance of the contract (paying the charges) may be excused. We thus believe that no charges should be made to these homeowners.

Section C. PURCHASING AGENT

AMENDMENTS TO CONTRACT PROVISIONS OF ILLINOIS MUNICIPAL CODE

(Purchasing Agent—J. E. S.—February 14, 1969)

Transmitted herewith for your review is a suggested bill to be introduced in the Legislature to amend Sections 8-10-3, 8-10-5 and to add Section 8-10-25 to the Illinois Municipal Code. Section 8-10-3 increases the contractual level for advertising from $2,500 to $5,000 so as to be consistent with other provisions of the statute in question.

Section 8-10-5 is amended to include therein a reference to "work or service". Section 8-10-25 is being added to permit debarment of bidders for reasons generally similar to those found in 41 CFR Subpart 1-1.6 as is now generally found in less detail in paragraph 8, Competency of Bidders, page R-2 of your Requirements for Bidding and Instructions to Bidders.

Pending enactment of Section 8-10-25, it is the opinion of this department that in each individual case where the circumstances warrant, bidders, such as Harrington Wrecking Company, need not be awarded a contract, but cannot be

placed on a list maintained in your office intended to serve a purpose similar to a debarment list.

RIGHT OF PURCHASING AGENT TO REJECT ALL BIDS

(Judge of the Circuit Court of Cook County—R. L. H.—September 15, 1969)

The last time Mr. L. Louis Karton and the undersigned appeared before you in the above matter, you requested from each of us a Memorandum of Law pertaining to the right of the Purchasing Agent of the City of Chicago to reject all bids. In researching cases from other jurisdictions on this point, some other pertinent law was found which should clarify the issues raised in this cause even more than just the one specific issue to which you desired a memorandum.

Mr. Karton's Memorandum of Law takes the form of a restatement of his facts and allegedly an application of the cases cited by him to his facts. We neither agree to the statement of facts as propounded by him nor to the argument and conclusions obtained therefrom. The following Memorandum consists merely of pertinent references to cases directly on point which, we believe, indicate that Plaintiff's cause of action should be dismissed.

1. The Court in Molloy v. City of New Rochelle, 198 N.Y. 402, 92 N.E. 94, 96, 97 (1910) distinguished that case from the Pennell case cited by Mr. Karton under point 4 of his memorandum on the basis that the Pennell case was one where a bid had been accepted (no bid has been accepted in the instant case either) and stated:

> "Although the plaintiff asserts rights under the statute, he also claims to be entitled to recover on contract. No contractual relation can arise merely from a bid unless by the terms of the statute and the advertisement a bid in pursuance thereof is, as a matter of law, an acceptance of an offer wholly apart from any action on the part of the municipality or any of its officers. Such plainly is not plaintiff's case. The statute and the advertisement call for proposals. The common council reserved the right to reject any and all bids. Under a statute requiring that all contracts shall be awarded to the lowest bidder, the body awarding the contract acting in good faith may refuse to award the contract if they deem it for the best interest of the city to so do, any may reject all of the bids and readvertise. Walsh v. Mayor, etc. of New York, 113 N.Y. 142, 20 N.E. 825."

2. In discussing a case arising out of the New York City Charter provision on bidding practices with the bid rejection reservation, the Court in Kayfield Construction Corp. v. Morris, 225 N.Y.S. 2d 507, 514 (1962) stated:

> "Section 343, subd. b vests the letting agency with the power to reject all bids 'if it shall deem it for the best interest of the city so to do.' . . . Thus it is clear Kayfield did not obtain a vested or property interest in the contract merely by reason of the fact that it submitted the lowest bid."

3. The provisions of the General Municipal Law of New York regarding bid letting and rejection of bids were the basis of the case of Arglo Painting Corp. v. Board of Education of City of New York, 263 N.Y.S. 2d 124, 128 (1965) where the Court said:

> "Petitioner's claim that it has a property right herein and that it is entitled to a hearing before disqualification is without merit. It has been held that 'petitioner did not obtain a vested or property interest in the contract merely by reason of the fact that it submitted the lowest bid.' (Matter of Kayfield Constr. Corp. v. Morris, 15 A.D. 2d 373, 378, 225 N.Y.S. 2d 507, 514). The law is well settled that an administrative determination without notice or

hearing does not violate any rights when the statute does not so provide and when the determination does not affect a property right."

4. The United States Circuit Court of Appeals for the 6th Circuit in the matter of United States Wood Preserving Co. v. Sundmaker, 186 Fed. 678 (1911) stated at page 684:

"The statutory provisions authorizing the director to reject any and all bids was notice to intending bidders, and to the director himself, that by his call for sealed proposals he was not obligated to accept any bid that might be made, or to award a contract thereon, unless he deemed the bid the lowest and best and the bidder satisfactory, and further adjudged the acceptance of the bid and the execution of a contract in pursuance thereof to be for the best interest of the city. The complainant's proposal bound neither party and, as a contract was not consummated, the city acquired no right against the complainant and the complainant acquired none against it. (Cases cited)."

The Court further stated, also at page 684:

"The submission, by a reliable and responsible bidder, of the lowest bid for a contract for public work to an official whose duty it is under the statute to let the contract to the lowest and best bidder, but who has the right to reject any and all bids, of which fact the bidder is bound to take notice when and before his bid is submitted, does not constitute an agreement that the officer will make a contract with such bidder for the work; nor does it give the bidder such a right to the contract as will authorize a court of equity, at his instance, to compel the officer to enter into a contract for the work with him, when such officer is about to award or has awarded it to another bidder, even though he be higher. Some of the cases decided under statutes permitting the rejection of any and all bids and otherwise similar or kindred to that under consideration, and some of the textwriters, sustaining this view, are State v. Directors and Wardens of the Ohio Penitentiary, 5 Ohio St. 234; State v. Board 81 Ohio St. 218, 90 N.E. 389; State v. Cincinnati, 3 Ohio Cir. Ct. R. 542; State v. County Commissioners, 9 Ohio Cir. Ct. R. (N.S.) 210, 214; Colorado Paving Co. v. Murphy, 78 Fed. 28; Brown v. City of Houston (Tex. Civ. App.) 48 S.W. 760; Kerr & Bros. v. City of Phila., 8 Phila. (Pa) 292; Hoole v. Kinkead, 16 Nev. 217; Anderson v. Public Schools, 122 Mo. 61, 27 S.W. 610; Johnson v. Sanitary District, 163 Ill. 285, 45 N.E. 213; Kelly v. City of Chicago, 62 Ill. 280; Douglass v. Commonwealth, 108 Pa. 559; Hanlin v. Independent Dist., 66 Iowa 69, 23 N.W. 268; Abbott's Munic. Corp. §268; High's Ex. Leg. Rem. §92."

This Court continued, again on page 684:

". . . But cases brought, like this, by a defeated bidder, are not to be confused with those brought by a taxpayer . . . The one has no vested right. The right of the other is real and substantial, and the law accords him the privilege of appealing to the courts to determine whether or not that right has been or is about to be invaded."

This Court on Page 683 discussed the discretionary powers that vested in the director to reject any and all bids, discussed with favor the decisions in State v. Board, 81 Ohio St. 218, 90 N.E. 389 and Ohio v. Hermann, 63 Ohio St. 440, 59 N.E. 104, and stated as follows:

"Both were suits in mandamus by unsuccessful bidders. Both of them, citing State v. Commissioners, 36 Ohio St. 326, broadly announce that the rule is well settled that, where authority is given by a statute to a board to let a contract to the lowest and best bidder, discretion is thereby conferred which the courts will not undertake to control. . . . The language of the opinion is clear that the discretion with which a court will interfere is a discretion exercised with a fraudulent intent to the injury of the party complaining, and that injury must be to a vested right."

5. It has been contended that there was no formal finding entered by the Purchasing Agent at the time of rejection of the bid as to the reason therefor. Reference is made to the decision of the Court in West v. City of Oakland, et al,

159 Pac. 202,205 (First Dist. Ct. of App., California. Rehrg. Denied by Supreme Court, 1916) where it is stated:

> "It is also contended by appellant that it was the duty of the City Council, upon determining that the M.G. West Company was not the lowest responsible bidder, to make a specific finding to that effect. Whatever the rule upon that subject may be in other jurisdictions, the question has been determined in this state adversely to the appellant's contention in the case of Rice v. Board of Trustees. 107 Cal. 398, 40 Pac. 551, wherein it was discussed and decided that it was not necessary for a municipal board, in making a record of its action in the rejection of certain bids, to also make an entry of its reason for so doing . . ."

6. A 1960 case decided under Michigan law, Malan Const. Corp. v. Board of County Road Com'rs, 187 F. Supp. 937 (D.C., E.D. Mich., S.D., 1960) stated at page 939 as follows:

> "Competitive bidding is not intended to benefit bidders. It is designed to protect the taxpaying public from fraud or favoritism in the expenditure of government funds for public works projects. The Michigan Supreme Court has held that the duty of public officials to consider honestly competitive bids runs directly to the community and that, therefore, only the public, through a taxpayer's suit, has standing to enjoin a proposed contract. The incidental benefit received by bidders from competitive bidding does not allow an unsuccessful bidder to bring a private action. Talbot Paving Co. v. City of Detroit, 1896, 109 Mich. 657, 67 N.W. 979; City of Detroit v. Wayne Circuit Judge, 1901, 128 Mich. 438, 87 N.W. 376, citing with approval Colorado Paving Co. v. Murphy, 8 Cir., 1897, 78 F. 28, 37 L.R.A. 630, appeal dismissed for want of jurisdiction 1897, 166 U.S. 719, 17 S. Ct. 997, 41 L.Ed. 1188. The Plaintiffs assert support for their position in the language in Talbot Paving Co. v. City of Detroit, supra, 109 Mich. at page 662, 67 N.W. at page 981, that '* * * there is a remedy by injunction to prevent the making of a contract with the next highest bidder. The language quoted, however, in the context of the entire opinion, indeed emphasizes that only the public, not the bidder, could enjoin the awarding of a contract."

7. The Connecticut District Court in the matter of Joseph Rugo, Inc. v. Hanson, 190 F. Supp. 281 (D. C. Conn., 1960) held that an unsuccessful bidder has no justiciable right to enjoin an award of a public contract under a lowest responsible bidder statute which was enacted solely for the benefit of the public and did not create any rights in those who submitted bids. The Court stated:

> "The defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be predicated is granted on the authority of Austin v. Housing Authority, 1956, 143 Conn. 338, 349, 122 A. 2d 399, 404, which holds that an unsuccessful bidder has no justiciable right to enjoin an award of a public contract under a 'lowest responsible bidder' statute since such statutes 'are enacted solely for the benefit of the public and in no sense create any rights in those who submit bids.' . . . It is clear, therefore, that the plaintiff, not being a taxpayer, has no standing by virtue of the low bidder statute."
>
> "The plaintiff seeks to avoid the holding in the Austin case by reliance on the 'common law of contracts'. But such reliance is misplaced. No contractual relation arises from the submission of a bid, even if such bid is the lowest submitted; a bid is no more than an offer which, until accepted, does not bind the offeree. See 10 McQuillan, Municipal Corporations, Sec. 29.80 (3d ed. 1950). Moreover, the invitation to bid, pursuant to which the plaintiff's bid was submitted, reserved the right to reject any and all bids not deemed to the best interests of the City. In the Austin case such a reservation was held sufficient to preclude any cause of action based upon the invitation to bid. 143 Conn. at page 349, 122 A. 2d 399; See also 10 McQuillan, op. cit. supra Sec. 29.77 and 63 C.J.S. Municipal Corporations §1005."

8. The Court in Rugo v. Henson, 148 Conn. 430, 171 A. 2d 409, 410 (1961) stated:

> "The court sustained the demurrer on two grounds: first that the city had a right to reject all bids and that no cause of action could be predicated on the invitation to bid; and second, that the right of plaintiffs, as taxpayers, to maintain such an action would arise only if the improper awarding of a contract would result in an increase of taxes."

and stated further at page 411:

> ". . . the recognized principle of law that where municipalities reserve the right to reject any or all bids they are empowered to do so. Straw v. City of Williamsport, 286 Pa. 41, 43, 132 A. 804; Rhyne, Municipal Law § 10-11."

9. Insofar as Federal Government procurement is concerned, decisions of the Comptroller General of the United States have long held that there is a right of rejection of all bids if it is determined to be in the public interest to do so and, also that no bidder on a government contract has a right to be awarded the contract solely because he is low bidder. Specific reference is made as follows:

> "Not only did the invitation for bids expressly state a reservation of the right to reject any and all proposals, but a request for bids or offers, irrespective of any such reservation, does not import any obligation to accept any of the offers received, and certainly it cannot be conceded that a public officer, acting for the general welfare, is bound to accept a bid, where he determines that the public interest would be served by a rejection of all bids. . . . In this connection there may be cited the recent case of White Motor Company v. Morgenthau, et al, Equity No. 65974, in the District Court of the United States for the District of Columbia (no opinion filed), which denied plaintiff's petition for injunction to compel the award to it of a contract as the lowest responsible bidder being apparently controlled by the principle that statutes governing the letting of public contracts are for the protection of the Government and bidders have no standing in court to compel administrative action thereunder." 17 Comp. Gen. 554 (1938).
>
> "It long has been recognized that in connection with the awarding of public contracts, no bidder acquires an absolute right to an award for public business but, rather, the public interest is first for consideration in the making of such award." 26 Comp. Gen. 49, 50 (1946).
>
> "It has long been recognized in connection with the award of Government contracts that no bidder has an absolute right to public business, but rather, that the public interest is for primary consideration in making an award. Further, it has consistently been held that an invitation for bids does not import any obligation to accept any of the offers received and, consequently, a public officer acting for the general welfare is not bound to accept a bid where he determines that the public interest would best be served by a rejection of all bids and a readvertisement of the needs of the Government. See O'Brien v. Carney, 6 F. Supp. 761; Scott v. United States, 44 C.Cls. 524; Colorado Paving Co. v. Murphy, 78 F. 28; 17 Comp. Gen. 554; 26 Comp. Gen. 49." 37 Comp. Gen. 12, 13 (1957).
>
> "Title 10 of the United States Code provides at section 2305 (b) that 'all bids may be rejected if the head of the agency determines that rejection is in the public interest.' Further, it has consistently been held that an invitation for bids does not import any obligation to accept any of the offers received and all bids may be rejected where it is determined to be in the public interest to do so. See O'Brien v. Carney, 6 F. Supp. 761; Scott v. United States, 44 C.Cls. 524; Colorado Paving Company v. Murphy, 78 F. 28." 37 Comp. Gen. 760, 761 (1958).
>
> "A low bidder does not have a vested right to the award of a government contract. . . . The IFB (Invitation For Bids) contained an express reservation of the right to reject any and all bids, and there was no basis for imposing an obligation to accept the lowest or any other bid received." Comptroller General's Decision No. B-166621 (July 10, 1969). 13 CCF Paragraph 82, 866.

10. The case of O'Brien v. Carney, 6 F. Supp. 761 (D.C. Mass., 1934), referred to in the Comptroller General Opinions quoted hereinabove in paragraph 9, was an action brought in the District Court by an unsucessful low bidder who, in his complaint to enjoin the award of a Federal Emergency Relief Administration contract to the next bidder, also set forth that he was a citizen and a taxpayer. In dismissing the plaintiff's action on motion, the Court held that a unsuccessful low bidder has no standing to enjoin execution of the contract and quoted authoritatively at page 762 from the Colorado Paving Co. v. Murphy case also referred to in the Comptroller General's Decision above to the effect that an unsuccessful bidder has no rights to any equitable relief. The court referred to the Colorado Paving case, 78 F. 28 at page 31 and quoted as follows:

> "It is now settled by the great weight of authority that the lowest bidder cannot compel the issue of a writ of mandamus to force the officers of a municipality to enter into a contract with him. * * * And the courts hold that he cannot maintain an action at law for damages for their refusal to enter into the contract. * * * This principle is as fatal to a suit in equity as to an action at law. It goes not to defeat any particular cause of action, but to defeat the right to any relief."

It is respectfully submitted that the foregoing authorities are only a small fraction of the cases available holding:

a. If the authorities are so empowered, they may reject all bids;

b. The discretion exercised in said rejection will not be interfered with by a court unless it was exercised with a fraudulent intent to the injury of a vested right of the complainant;

c. One who submits a bid pursuant to an invitation to bid is merely making a proposal and has no vested right in the contract;

d. An unsuccessful bidder has no standing in court to either enjoin the award of a contract to another or require award to him; and

e. A taxpayer's suit for illegal award of a contract (and in the instant case no contract has been or will be awarded) will lie only if the improper awarding of the contract would result in an increase of taxes.

It is the position of all of the defendants herein that there is no question that the bids of all of the bidders were rejected pursuant to the authority vested in the Purchasing Agent by statute; that there is no question that the plaintiff herein has no vested right in the contract (he stated this himself); and there is no question that the plaintiff herein is attempting to maintain this action as an unsuccessful bidder who has no standing in court. Further, the plaintiff herein neither alleges that he is a taxpayer or that his taxes or any taxes will be increased due to the rejection of all of the bids herein. It can also be stated that the instant case is not one where a contract has been or will be awarded to another higher bidder, plaintiff's protestations to the contrary notwithstanding, but is solely a case where the Purchasing Agent, in the exercise of the discretion authorized by statute, has rejected all of the bids on the basis of his determination that the public interest will be best served thereby.

It is respectfully submitted that the Purchasing Agent acted properly within the framework of the law and that the plaintiff has no standing to maintain this action. The defendants, and each of them, respectfully request, as prayed in the Motion to Dismiss, that this cause be dismissed.

GAS COMPANY CONTRACT WITH CITY

(Purchasing Agent—P. A. L.—November 30, 1967)

Pursuant to your request in your letter of November 9, 1967, we have reviewed the tentative contract between the Gas Company and the City and find no objection to the taxes set forth therein. However, we would like the "liability disclaimer" clause rewritten where it would spell out clearly that the Gas Company is to be liable for its own negligence.

CONTRACTOR'S REGISTRATION NUMBER REQUIRED

(Purchasing Agent—C. F.—September 27, 1967)

Returned herewith in triplicate, pursuant to your recent request is the above cited contract No. 28595.

Subject to requiring the Contractor to affix his registration number as required by Chapter 96, Section 4 at sub. (Ill. Rev. Stat. 1965) and subject to the propriety of accounting charges, it is our opinion that this will be a valid and binding contract when signed by the Purchasing Agent, the City Comptroller and the Mayor.

RETAINER FEE WITHHOLDING

(Purchasing Agent—F. G. S.—August 28, 1970)

Your letter of August 20, 1970 addressed to Richard L. Curry, Corporation Counsel, together with the copy of the letter dated August 18, 1970 received from Law Offices, O'Keefe, Ashenden, O'Brien, Hanson, Lyons and Associates, and a copy of our opinion dated July 21, 1970, regarding the matter of retainer fee withholding, has been referred to the undersigned for reply.

A review of our opinion dated July 21, 1970 reveals that Section 26-13.1 of the Municipal Code of Chicago is not applicable to the contract which was the subject of your letter. Therefore final estimates and final payments in connection with that contract need not be submitted to the Committee on Finance of the City Council and said final payments do not require approval of the City Council. This in no way alters the fact that Section 26-13 of the Municipal Code of Chicago is applicable and is incorporated by reference in the contract documents between the parties, specifically in section titled "Payment to Contractor, item 13, page G-2, General Conditions, Contract for Work, Requirements for Bidding and Instructions to Bidders."

Section 26-13 applies to "every contract for any public improvement", and further provides that the percentages set out in the table in said section "shall not be payable until such contractor shall satisfy the purchasing agent . . . that the work covered by such contract has been fully completed in accordance with the provisions thereof."

It is our opinion that the purchasing agent may make final payment on a contract if he finds that the provisions of Section 26-13 have been fully complied with, namely that he shall be satisfied that "all subcontractors, workmen and employees have been fully paid, and that *the work covered by such contract has been fully completed in accordance with the provisions thereof.*" (emphasis added).

The correspondence attached to your earlier letter indicated that the work covered by the subject contract has not been fully completed. Therefore, under the percentage table set out in Section 26-13, 2% of the total amount should be retained until the work covered by the contract has been fully completed in accordance with the provisions thereof.

USE OF RETAINERS FEES HELD UNDER CITY CONTRACTS

(Purchasing Agent—F. G. S.—July 21, 1970)

This office is in receipt of your letters of June 26, 1970, and July 1, 1970, in which you request an opinion as to whether the retainer fees being held under the terms of contracts for public work projects can be reduced to nominal amounts

in accordance with contractor's request, provided waivers are received from all sub-contractors and material suppliers.

Section 26-13 of the Municipal Code of Chicago provides as follows:

"26-13. Every contract for any public improvement or other work shall provide that certain percentages, in accordance with the table set out below, shall be reserved out of the monies earned upon such contract to insure the proper performance of the work covered thereby and a full compliance with the provisions of the contract, and such percentages shall not be payable until such contractor shall satisfy the purchasing agent that all subcontractors, workmen and employes have been fully paid, and that the work covered by such contract has been fully completed in accordance with the provisions thereof:

"10% of each monthly payment estimate covering the first 50% of the work shall be held until completion of the work covered by the contract; Upon completion of the work and prior to computation of the final quantities, 2% of the total amount of the contract shall be retained out of said aforementioned reserve, and the balance released to the contractor; Upon computation of the final quantities of work, said retained 2% shall be paid in final payment."

Section 26-13.1 further provides that:

"26-13.1. That the final estimates and final payment on all contracts passed by the city council, which said contracts are in an original amount in excess of fifty thousand dollars, be submitted to the committee on finance by the various departments and said final payments not be paid except on approval of the city council."

It is our opinion that any amount in excess of 2% of the total amount of the contract may be paid to the contractor upon proper presentation of waivers for all subcontractors and material suppliers.

However, in accordance with the provisions of Sections 26-13 and 26-13.1 of the Municipal Code of Chicago, the sum of 2% of the total amount of the contract shall be withheld and paid only upon completion of the work covered by the contract, upon submission to the Committee on Finance of the City Council, said final payment not to be paid except on approval of the City Council.

It is therefore our opinion that the sum being withheld for subject project may not be reduced below 2% of the total amount of the contract, and that the balance of 2% of the total amount of the contract be paid only as provided for in Sections 26-13 and 26-13.1 of the Municipal Code of Chicago.

ELEMENTS OF A SERVICE CONTRACT

(Purchasing Agent—C. F.—October 3, 1967)

Transmitted herewith is the above cited contract proposal, pursuant to your recent letter, without action by this department.

We suggest that this contract proposal should be redrafted, preferably as a service contract, and awarded without competitive bidding, if you choose this course of action, under Chapter 24, Section 8-10-4, (Ill. Rev. Stat. 1965) as amended by the 75th General Assembly.

However, we also suggest that the contract set out specifically, as well as generally, the scope of Contractor's duties and services; Provisions for a precise starting date and termination date; definite controls over Contractor's work and performance which should reside in the Commissioner or his designated representative; a statement of work classifications and maximum hourly or work-day salary scales for each, as these relate to Contractor's personnel assigned to this project; a requirement that Contractor submit an accounting of labor and supply costs and related expenses, as well as storage charges and the quantity of mate-

rials stored; and a statement in the payment provision that such payment "shall not exceed" a specific amount.

These are some of the vital provisions which should be set out. There are other reasonable limitations which, we suggest, should be incorporated to insure the City proper enforcement procedures, satisfactory work and storage provisions which leave the City with options.

CHAPTER XIII—PUBLIC IMPROVEMENTS

Section A. AIRPORTS

DISCRIMINATION BASED ON SEX

(Director, Division of Compliance and Investigation, Commission on Human Relations—M. S. J.—July 16, 1969)

Your recent letter containing certain enclosures, described below, sent to this office has been referred to the undersigned for reply. You desire information as to the recommended disposition for two complaints that have been filed in your office against United Air Lines alleging discrimination on the basis of sex. The enclosures you have submitted are the case histories for the two complaints and a response by United Air Lines.

In brief, the complaints allege that United Air Lines operates a so-called "executive flight" from Chicago, Illinois to Newark, New Jersey limited to men. United admits this allegation. It is further alleged that this practice is in violation of the City's Public Accommodations Ordinance, Chapter 199-A, Municipal Code of Chicago, the United States 1964 Civil Rights Act, and the State's Public Accommodations Statute, Chapter 38, paragraphs 13-1 to 13-4 (Ill. Rev. Stat. 1967).

The United States Constitution reserves to the federal government responsibility for regulation of interstate commerce. The Congress of the United States has delegated that function to the Secretary of Transportation. Consequently, the City of Chicago has no authority to regulate air carriers engaged in interstate commerce. It is recommended, however, that the Commission forward to the Secretary of Transportation its file along with a request that the Secretary evaluate that file for the purpose of determining whether or not United Air Lines policies and procedures are violative of the complainants' civil rights.

ENGINEERING MANAGEMENT AND SUPERVISION CHARGES

(City Comptroller—J. E. S.—November 24, 1967)

Your recent letter requested that this department advise whether or not engineering management and supervision charges of the Department of Aviation in the construction of air mail facilities at ORD could be charged against the tenant as indicated in an undated memorandum from the Department of Aviation.

It is suggested that absent a provision in the City Code or a specific clause in a contract providing for the assessment of such charges, it is legally questionable whether the charge is in order. The relationship between the City and the tenant parties is controlled by law by the contract document proper. Absent such a provision the charges are more properly assessed as an expense incurred in the general operation and maintenance of the airport.

HELIPORT ORDINANCE

(Chairman, Committee on Aviation—R. L. C.—April 12, 1972)

Subsequent to our recent meeting with Mayor Daley relative to proposed changes in the City Heliport Ordinance, you forwarded a copy of those changes for my review. The following are random comments which I think are im-

portant for further consideration by your Committee before the draft which you supplied could be considered as worthy of Council action.

Section

37.16. No objection of change from "rotary wing aircraft" to "helicopter".

Proposal adds the word "hazards" before obstructions—does this mean that it is all right to have non hazardous obstructions within the peripheral area? What is a "hazardous" obstruction? Who determines that it is or is not hazardous? What standards are used to determine "hazardous"?

On what basis do we reduce the safety area from the current 17½ feet to 15 feet? FAA Heliport Design *Guide* provides for peripheral area equal to ¼ the length of the helicopter. If you compare our present ordinance requirements against the *Guide,* we are already slightly smaller. Alderman Laskowski's proposal even diminishes that.

Approach Zones

The proposed ordinance eliminates specifics as to the dimensions of the obstruction free glide path—the proposal calls for an obstruction free glide slope but strikes all measurements so as to make the determination of what is an obstruction free glide slope an impossibility.

The present ordinance language on the subject is taken from the FAA Guide paragraphs 28 and 29(B)—the FAA suggests a radius of 700 feet—our present ordinance provides for 600 feet—the proposal would establish *no* measurement.

Lateral Clearance Zone

The FAA Guide and our present ordinance provides a lateral clearance zone of 2 foot horizontally for each one foot of vertical—the proposed modification would cut that ratio to 1 to 1—what is the justification, study, or basis upon which this reduction is made—how can it be explained or supported?

Emergency Landing Areas

Chicago's present ordinance in this regard is probably too restricted *but* the proposed provisions completely eliminate them.

In this regard, we would suggest that the amendment to our present ordinance be accomplished to bring emergency landing area provisions in line with the *new* FAA regulations on the subject.

37.19. Having eliminated emergency landing areas as above, the proposal naturally deletes the same from the application for a heliport license. It should be noted that the Illinois Department of Aeronautics requires such an affirmative statement on the application. Good and compelling reasons must be established if these are to be eliminated from the city ordinance.

The proposal also eliminates the map which is to be filed with the application—without the map there is no way that the licensing authority can measure and see if the approach zones and lateral clear zones are adequate.

37.20. Proposed modification would eliminate permit review by the Commissioner of Buildings and the Commissioner of Fire. It would make the Commissioner of Aviation the sole review prior to licensing. Clearly, the Department of Aviation has no competency in the application of Building and Fire Codes.

Since the proposal at hand provides a role for the Building and Fire Department in later sections, they should certainly be included at the the initial license review stage.

37.21. Without definition, the new term "helistop" is meaningless.

The present ordinance requires that roof top landing area be "non-combustible"—the FAA Guide requires that it be "fire retardant"—the proposed ordinance amendment would require that roof top landing areas be "fire resistant". Since the roof itself by reason of the Building Code must be "fire resistant", the landing pad on which it rests should certainly be of a higher rating.

"Fire resistant" is customarily qualified in the Municipal Code by specific reference as to the extent of resistancy, i.e. ½ hour or 2 hour rating—the proposal is silent as to any rating. Therefore, the term "fire resistant" is rendered meaningless.

The proposed ordinance eliminates specific reference to "chain link fence" and talks of "personal safety fence"—no standard is provided for this new term other than "each elevated site must be judged on its own merits". This broad grant of discretion is clearly invalid. Absent specific standards on the subject, no one can reasonably anticipate or know the Commissioner of Aviation's subjective determination as to what is permitted and what is limited.

The proposal eliminates markings as to class and maximum design load of heliports—unless each roof top pad is constructed to accommodate the largest helicopters, it would seem essential that the maximum capacity for this structure be clearly visible.

The proposed ordinance changes "emergency escape *stairway*" to "emergency escape *device*". Here again, there is no way to ascertain the meaning of the word "device"—the proposal suggests that the device be "approved" but is silent as to who has the authority for such approval (Underwriters Laboratory, the Commissioner of Buildings, the Commissioner of Aviation, the Mayor, the building owner, who? Note that the FAA Guide refers to "stairway".

Maintenance

The proposed ordinance amendments eliminate the present requirements that heliports be "utilized only by personnel trained and instructed" in fire alarm and fire extinguishment equipment.

The proposal also eliminates auxiliary power for starting as well as "tie down" equipment—why are these eliminated?

37.24. The proposed ordinance amendments eliminate the current prohibition against landing or taking off from any property other than a licensed heliport. Attempt is then made to approve landings near hospitals even where those sites could not be licensed due to failure to meet Code requirements. The manner in which this is done in the proposal effectively eliminates *any* prohibition against the use of non-licensed sites. Inasmuch as the end sought to be achieved here is to accommodate emergency operations in and near hospitals, and recognizing fully that those emergency operations are customarily handled by the police or fire, the current ordinance could simply be amended by adding a provision which would allow police and fire emergency operations from non-licensed sites.

As I originally stated, these are random comments which, in my opinion, clearly indicate that this proposal is nowhere near ready for public hearings or City Council action. I believe that your Committee should isolate those specific provisions of the existing heliport ordinance which are either inappropriate or outdated and that we direct our attention not to a broad "change for the sake of change" revision, but merely to attending to those matters which time, experience and the advances in aeronautical technology have rendered inappropriate.

PROPOSED AMENDMENTS TO HELIPORT ORDINANCE

(P. Z.—R. L. H.—June 5, 1973)

Some months ago at a meeting with the undersigned attended by Mr. Angsted from Chicago Helicopter Airways, Mr. Igoe, their attorney, and yourself, we discussed the necessity for amending the current heliport ordinance to permit the construction of a proposed heliport at 323 South Canal Street. Amendment was necessary since it is intended that aircraft having a gross weight in excess of 15,000 pounds utilize this new heliport and our current ordinance has no provisions for aircraft exceeding this weight.

Other proposed ordinance changes were discussed and the meeting adjourned with a further meeting to be set once proposed ordinance changes were submitted by you for our review and comments.

I have had the opportunity to review the proposed changes which you dropped off with me a few weeks ago and find that some of the changes cannot be approved based upon the current status of the art as outlined in the 1969 FAA Heliport Design Guide.

Forwarded herewith for your review are the changes in the current ordinance that do meet, within reason, the aforesaid Design Guide suggestions. You will note that the changes proposed in the approach zone and lateral clearance zone have not been incorporated therein since, as stated previously, I can find nothing from the FAA in writing that modifies the requirements set forth in the Design Guide.

In the event some discussions were had with officials of the FAA which indicate that the FAA concurs with your proposed changes in these two zones in relation to the use of multi-engine aircraft, I would appreciate receiving some written memorandum from the FAA to that effect for further study. Absent this, it is impossible for the City of Chicago to set forth heliport criteria which are less restrictive than the currently available FAA suggested criteria. The safety and welfare of the citizenry takes precedence over a private company's request for a heliport even though said heliport is intended to serve the public in getting to and from the airports.

CHICAGO MUNICIPAL AIRPORTS LANDING FEES AND FERRY FLIGHTS

(Commissioner of Aviation—R. L. H.—July 18, 1972)

We have reviewed the request contained in your letter of July 13, 1972, in the above entitled matter and, in addition, have reviewed both the O'Hare and Midway Use Agreements and have discussed this matter with members of your Department.

Our review indicates that this question arose in a letter from Ozark Airlines relating to whether they are properly being charged landing fees at Chicago-O'Hare International Airport on landings of non-revenue flights of aircraft from Meigs Field for purposes of service and maintenance.

Both the O'Hare and Midway Airport Use Agreements provide an exemption from landing fees for non-revenue flights between said airports. There is no provision in either Agreement for an exemption from the landing fees for such flights from Meigs Field.

It appears that although an exemption would be proper on a logical basis from the landing fees at both O'Hare and Midway on non-revenue flights origi-

nating at Meigs Field, the exemption is not available pursuant to the terms of the Airport lease Agreements. The language of the Meigs Field lease preclude a landing fee at Meigs on a non-revenue flight from Midway and O'Hare but the reverse flight would be subject to a fee.

It is therefore our opinion that until and unless the O'Hare and Midway Airport Use Agreements are amended, non-revenue or ferry flights to either of these airports from Meigs Field are subject to the landing fees at said airports.

LEASES AND FINANCING AT O'HARE

(City Comptroller—J. E. S.—January 30, 1969)

Your recent letter requests the opinion of this department concerning the ability of the City to lease real estate at ORD and to permit the Lessee thereof to thereafter arrange leasehold financing within the provisions of the ORD Revenue Bond Ordinances.

Be advised that a review of said bond ordinances would indicate that under certain circumstances as described in Section 2.16 (d) the City not only may, but must enter into leases in order to assure repayment of the principal and interest requirements and in Section 7.06 the City is specifically granted the right for any term of years to let to any person, firm or corporation, any land of the airport for any necessary or incidental purpose relating to the operation of the airport.

The matter relating to assignment of a leasehold for financing purposes at the airport is not again, in the opinion of this department, precluded by the provisions of said Revenue Bond Ordinances. The governing document is the lease proper which is as discussed supra specifically authorized. The subsequent assignment is subject to and within the four corners of the lease. No greater interest in the premises is granted to the assignee as was granted to the assignor and consequently such assignment would not constitute an encumbrance upon fee title.

Consequently, this department, in this instance, would see nothing objectionable if, as required by statute, the lease record was entered upon the Torrens Certificates.

TITLE OPINION—MEIGS FIELD

(Commissioner of Aviation—K. R. B.—May 31, 1968)

In connection with the above project application and pursuant to your request, we submit the following opinion as to the right and interest of the City to use and occupy as a municipal airport a portion of the property located on Northerly Island and the submerged lands lying adjacent thereto and located in Sections 22 and 23, Township 39 North, Range 14 East of the Third Principal Meridian in Cook County, Illinois, otherwise known as Merrill C. Meigs Field.

The right and interest of the City of Chicago to use and occupy said premises is based on a lease and amendments thereof from the Chicago Park District, a municipal corporation. Execution of said lease and amendments thereto was authorized by ordinance of October 8, 1946 (C.J. pp. 6438-6440), as amended by ordinance of December 17, 1948 (C.J. page 6711), as further amended by ordinance of April 4, 1949 (C.J. page 3946), and as further amended by ordinance of September 14, 1955 (C.J. pp. 971-2), and as further amended on August 22, 1963 (C.J. pp. 801-2).

Title to Northerly Island and the submerged lands lying adjacent thereto leased by the Park District to the City is vested in the Chicago Park District pursuant to an Act entitled "An Act to enable park commissioners having control

of a park or parks bordering upon public waters in this state to enlarge and connect the same from time to time by extensions over lands and the bed of such waters, and defining the use which may be made of such extensions and granting lands for the purpose of such enlargements", approved May 14, 1903 (1963 Ill. Rev. Stats., ch. 105, para. 92, et seq.). Section 1 of said Act provides:

> "That every board of park commissioners existing under the laws of this state, which has now, or may hereafter have or acquire control over any public park, boulevard or driveway bordering upon any public waters in this state shall have the power to extend such park, . . . by constructing a park . . . extending over and upon the submerged land and bed of such public waters, and over and upon any lands adjacent to or adjoining upon or penetrating into such waters. . . ."

Section 4 of said Act provides:

> "The title to any such extension or connection of such park or parks, boulevards, driveways and parkways, and to the bed thereof shall be, and hereby becomes vested in such board of park commissioners for public purposes, and the same shall thereby become a part of the public park or parks under the control of such board, and shall thenceforth be maintained and controlled by such board in the manner provided by law, for the government and maintenance of other parks, boulevards and driveways under its control, and all cases where any boulevards, driveway or parkway is extended or constructed under the provisions of this act, the title to the submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard, driveway or parkway, shall be, and thereby becomes vested in such board of park commissioners for public purposes; and in case any such park, boulevard, driveway or parkway extension or connection as provided in this act shall be made into, over or upon the bed of Lake Michigan by any such board of park commissioners, then the right, title and interest of the State of Illinois in and to the bed of so much of said Lake Michigan shall be vested in such board of park commissioners as in other cases provided in this act, and for the same purposes and within the same rights and power."

The South Park Commissioners was a board of park commissioners existing under the laws of the State of Illinois having control of a public park bordering upon the public waters of the state, and thus, under the provisions of said Act, had the right to extend the park by filling in the submerged lands of Lake Michigan, and upon so doing, the title thereto vested in the South Park Commissioners.

Under the provisions of the Act in relation to the creation, maintenance, operation and improvement of the Chicago Park District approved July 10, 1933 (1963 Ill. Rev. Stats., ch. 105, para. 333.1), the Chicago Park District was created in succession to the South Park Commissioners and became vested with all the rights and powers of the South Park Commissioners.

In 1935 the legislature passed an Act entitled "An Act to enable park commissioners, park boards or boards of park commissioners to grant, convey or lease lands and rights to cities and villages for airport uses and purposes", approved July 11, 1935 (1963 Ill. Rev. Stats., ch. 105, para. 327c1). Said Act provides:

> "That any park commissioners, park board or board of park commissioners which has heretofore acquired or shall hereafter acquire the title to any lands adjacent to or adjoining upon or penetrating into any public waters in this State or to the submerged lands and bed of such public waters, or any part thereof, or to any riparian or other rights, may grant, convey or lease any of such lands or rights to any city or village authorized to establish, maintain and regulate airports in, over and upon the public waters bordering thereon. Any such park commissioners, park board or board of park commissioners may grant, convey or lease to any such city or village the right to construct and maintain causeways, roadways and bridges and any other appropriate approaches to or connections with any airport, landing field, airdrome or landing float of such city or village over and across any

lands and property of such park commissioners, park board or board of park commissioners."

The Act above cited granted to the Chicago Park District the right to lease Northerly Island and the submerged lands adjacent thereto the City of Chicago for airport purposes.

It should be noted that under Section 4 of the 1903 Act by which the submerged lands of the state were conveyed to the park district, title to such lands vested in the park commissioners for "public purposes". The operation of a public airport and maintenance thereof by a municipality has been held by the Illinois Supreme Court to be a public purpose, so that there is no inconsistency between the Act of 1903 vesting title in the park district and the Act of 1935 authorizing the park district to lease said lands to the City of Chicago for the establishment, maintenance and regulation of airports.

AIRCRAFT NOISE POLLUTION

(M. E. C.—Office of Noise Abatement, Federal Aviation Administration —J. E. S.—October 20, 1967)

A copy of your letter dated October 10, 1967 addressed to the office of the Superintendent, Police Department, has been received by this department. In said letter request and demand is made that the police department or the City enforce all city and state statutes regarding noise control in connection with aircraft being near or over your home or premises.

In the most recent case of *American Airlines, Inc.*, v. *Town of Hempstead*, the United States District Court for the Eastern District of New York, held that a municipal noise abatement ordinance as adopted by the town would, if complied with, respect in the abandonment of landing approach and takeoff procedures long in use and chosen by the Fereral Aviation Administration for valid air traffic and safety reasons at the John F. Kennedy Airport; would regulate interstate and international aircraft flights in navigable air space and would invade an area of regulation committed to federal care.

As a consequence thereof, the court granted the request of the airlines and the Administrator of the Federal Aviation Administration, as intervener, and entered a preliminary injunction against the enforcement of the ordinance.

The court in the decision discussed the question of local ordinances or state statutes as related to federal pre-emption in this field in the following language:

> "The regulation of interstate and foreign navigation from the beginning of our constitutional history raised questions of the relative scope of state power and of the power of the national government. The inquiry whether regulation of the navigation of aircraft in interstate and foreign commerce is a field—in the language of *Cooley*—'imperatively demanding a single uniform rule' does not need to be and cannot be broadly answered. But legislation, whatever its purpose, that denies access to navigable air space by local rule cannot but be regarded as a plain and forbidden exertion of the power to regulate commerce as such. By the very naure of the power exercised, it could be used by neighboring towns to impose different and inconsistent rules, and the operator of aircraft thus be required to conform to the most exacting rule.
>
> "But even if the commerce clause were not thought without more to preclude local action of the kind here involved, the actual exercise by the Congress of the power to regulate in this field is so pervasive as to preclude valid enactment of the Hempstead Ordinance. . . ."

The foregoing language would have equal application to Chicago-O'Hare International Airport and to like ordinances of the City of Chicago.

In view of the foregoing, this department has taken the liberty to forward a copy of your letter to the Office of Noise Abatement, Federal Aviation Adminis-

tration, Department of Transportation, Washington, D. C., for attention and consideration. Your interest in this matter is appreciated.

PUBLIC HEARINGS—APPROPRIATE OFFICES

(Deputy Commissioner, Department of Development & Planning—A. H. —February 4, 1970)

Your recent letter seeking to be advised with respect to the appropriate offices of city government which may hold public hearings pursuant to state law requiring such hearings in relation to certain airport matters has been referred to the undersigned for consideration and response.

The provisions to which you refer are found in Sections 11-102-4a, 11-102-4b, 11-102-4c and 11-102-4d of the Municipal Code of Illinois (Ill. Rev. Stat. 1969, Ch. 24, pars. 11-102-4a, 11-102-4b, 11-102-4c and 11-102-4d). The foregoing provisions relate to the requirement of public hearings whenever "any plan to change a municipal airport's physical facilities, including but not limited to construction of runways, additions to or relocation of runways, construction of terminals and of parking areas, . . ." is involved and would affect the residents of any contiguous municipality in the use and enjoyment of their property; or whenever said plan involves locating or relocating of a state, county, or municipal street or highway or part thereof by the airport authorities under certain circumgraph 9, was an action brought in the District Court by an unsuccessful low bidder carrying out its governmental or proprietary functions. The statutory provisions to which we refer do not designate the forum before which the hearing must be presented; however, it would appear that the Chicago Plan Commission would be the most appropriate forum for the following reasons.

Any plan, design or other proposal by any public body or agency which requires the acquisition or disposition of real property within the limits of the municipality, or changes the use of such property or the location of any improvement thereon, must be referred to the Chicago Plan Commission under the existing law (Ill. Rev. Stat. 1969, Ch. 24, par. 11-12-4-1). The Chicago Plan Commission must hold public hearings whenever an amendment, among other things, to an existing comprehensive plan is made under existing law (Ill. Rev. Stat. 1969, Ch. 24, par. 11-12-7). It would therefore appear that an existing agency, which is already concerned with similar or parallel problems, such as the Chicago Plan Commission, would be the appropriate body to hold public hearings pursuant to the airport amendatory laws to which you make reference.

Accordingly, it is our opinion that at such time or times when a municipal airport's physical facilities may be affected by construction, addition, or relocation, among other things, is contemplated, the airport authorities should apply to the Chicago Plan Commission for the initiation and conduct of the public hearings contemplated by the statutory provisions first above-cited.

NEW AIRPORT TAXIWAY—PUBLIC HEARINGS

(Commissioner, Department of Development and Planning—A. H.— June 10, 1971)

Your recent request for an opinion with respect to whether a public hearing is required, or not, regarding Plan Commission review of a proposal to construct a taxiway to serve the future southwest cargo area at Chicago-O'Hare International Airport, has been referred to the undersigned for consideration and response.

We have examined the data accompanying your request, herewith returned to you, and have noted the general information therein contained. Notwithstanding the fact that the proposed taxiway appears to run parallel with existing

runways, new and additional activities may be reasonably expected to take place upon and throughout the proposed taxiway, particularly since it will serve a cargo area to be developed in the future.

It is our opinion that under the broad language contained in Section 11-101-3(1) of the Municipal Code of Illinois (Ill. Rev. Stat. 1969, Ch. 24, par. 11-101-3), the proposed taxiway could and, in all probability, ". . . would affect the residents of any nearby municipality in the use and enjoyment of their property." Therefore, the hearing required in said section should be conducted as part of the preliminary proceedings.

PICKETING IN TERMINAL BUILDING AT O'HARE

(Commissioner of Aviation—E. H.—April 4, 1972)

Your letter to Mr. Curry has been referred to me for response.

The question you have put to us is whether peaceful labor picketing may be prohibited at O'Hare Airport, particularly in an area near an airline ticket counter.

This inquiry you have referred to us was received from the Airline Pilots Association, International (A.L.P.A.), which represents airline pilots, stewards and stewardesses and other personnel of the major airlines. Its counsel states that the picketing will be "purely informational," that there will be only two pickets at any one time, that the pickets will be airline employees, and that there will be no attempt to influence the public not to patronize a particular airline or to persuade employees "to refrain from performing their duties."

Prior opinions rendered by this office have dealt with aspects of this subject.

On November 8, 1957, we advised that the sidewalks adjacent to the terminal building of O'Hare Field, Chicago International Airport, though owned by the City, were private property, not "public ways of the city", for the reason that the City owned the Airport in its proprietary, not its governmental capacity. 24 *Opinions of the Corporation Counsel* 726.

On August 30, 1965, the Commissioner of Aviation was counseled by us that he might, in his discretion, allow or prohibit distribution of union handbills within the Terminal Building at O'Hare Airport. 25 *Opinions of the Corporation Counsel* 614. The opinion noted that "a public building is not necessarily to be treated in the same manner as public streets and ways as far as freedom to distribute literature is concerned", and concluded that "if in the discretion of the Airport Manager the orderly administration of the public business requires restriction of the distribution of literature within the Terminal Building he may order such restriction."

This issue was also expressly determined by the U.S. District Court in Chicago in *Nelson on behalf of Air Transport Local 512, Transport Workers Union (AFL-CIO)* v. *City of Chicago,* 9 C.C.H. Aviation Cases 17, 878 (1965). That was an injunction proceeding brought by the union to restrain the Chicago Police from interfering with the union's informational picketing at the ticket counter of Chicago Helicopter within Terminal Building No. 3 at O'Hare Airport. Judge Robson denied the union an injunction, holding that the right of a municipality to manage its airport and avoid obstruction to the heavy flow of air passenger traffic outweighs the right of a union to engage in informational picketing within the municipal airport terminal building and that, therefore, the municipal police should not be prohibited from interfering with the union's picketing of the ticket counter. This limitation on picketing to outside the Terminal Building was entered despite the fact that such outside picketing would be ineffective as to Chicago Helicopter, whose customers usually do not go outside the building, but both arrive and depart by air. Judge Robson viewed the factual situation at O'Hare (at 17, 882, 17,883) thus:

> "While in one respect the Terminal may be deemed the private property of the City, in another and far more important aspect it is an extremely

important public facility. The smooth functioning of the operation of this terminal is of utmost importance to the metropolis. The 'split second' type of operation carried on there, with the tremendous volume of traffic of passengers, personnel and visitors, demand that impediments causing congestion be held to a minimum or completely obliterated.

"True though it be that the lone picket which plaintiffs seek to maintain in as unobtrusive a manner as possible, with minimum placard and the picket constantly in motion at a distance from the Helicopter's counter so as to cause little disturbance, the Court believes he would constitute an obstruction to the smooth flow of extremely heavy traffic, much of which could well be seeking hurriedly to board planes, purchase tickets, or making interchange of transportation. Any obstruction in a corridor of this kind is hazardous both to the well being of the persons traversing the corridor, and lessens their convenience, and the overall maintenance of the terminal, the concessions, facilities, planes and equipment."

In conclusion Judge Robson ruled (at 17,883):

"Plaintiffs are not completely prohibited from picketing, but are required only not to do so within the confines of the building."

Thus, our inquiry is reduced to a determination whether the propriety of Judge Robson's order in the *Nelson* case has been modified by developments in the law since 1965.

Carriers by air and their employees, such as the picketing stewardesses in the matter before us, are subject to the Railway Labor Act instead of the National Labor Relations Act. 45 U.S.C.A. §§ 181, 185.

The two principal statutes regulating labor-management relations, the Railway Labor Act and the National Labor Relations Act, rely on quite different procedural policies and mechanisms. Meltzer, *Labor Law* (1970), p. 81. Whereas the provisions of the National Labor Relations Act are enforced in the first instance by an administrative agency, the National Labor Relations Board, the Railway Labor Act establishes administrative machinery only for the handling of representation issues, which are entrusted to the National Mediation Board, and the other provisions of that Act are enforced by the criminal law.

Therefore, the large body of N.L.R.B. law granting labor interests access, for union organizational or collective bargaining pressure purposes, to private property, owned or leased by management, but either used by the public or by the employees in their non-working time, when there is no reasonable alternative channel of communication (*N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956); Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 Minn. L.Rev. 505 (1965); Broomfield, *Preemptive Federal Jurisdiction over Concerted Trespassory Union Activity*, 83 Harv. L. Rev. 552 (1970)) is inapplicable to O'Hare. Labor pickets have no statutory right to be there, and unless they have a constitutional right in the premises, they are subject to the leading Illinois case of *People* v. *Goduto*, 21 Ill. 2d 605 (1961), under which union organizers, who go upon an employer's premises for the solicitation of employees and refuse to leave when ordered by the employer to do so, are subject to prosecution for criminal trespass.

The pickets either have a constitutional right to picket the ticket counter at O'Hare, or they have no right to do so.

The United States Supreme Court has ruled that pickets do have such a constitutional right—in certain circumstances. In *Amalgamated Food Employees Union Local, 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), it held that a State's generally valid laws against trespass to private property cannot be applied so as wholly to exclude from private property freely accessible and open to the public, those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is put. We say, "in certain circumstances," however, because such cases especially turn on the facts of the particular case. The relevant circumstance is whether or not reasonable alternative means of communication are available.

In *Logan Valley Plaza* there were no reasonable alternative means. That case had to do with labor picketing of a supermarket in a privately owned shopping center located in the open country near the intersection of two highways. The picketing was conducted in the supermarket's parcel pickup area and in an adjacent section of the shopping center parking lot. A state court injunction obtained by the employer restricted the pickets to the ledges of the highways, 350 to 500 feet away from the store picketed. The Supreme Court found that this rendered the pickets' placards virtually indecipherable by the persons at which they were directed and also exposed the pickets to danger. The court concluded that the state injunction substantially hindered the pickets' exercise of their First Amendment rights.

The United States Court of Appeals for the Third Circuit has gone further than this. In *Wolin* v. *Port of New York Authority,* 3 Cir., 1968, 392 F.2d 83, it enjoined interference with antiwar protest picketing in the Port Authority's Bus Terminal Building in Manhattan. The Third Circuit rejected the Port Authority's contentions that the protestors' activities might obstruct traffic and that their distribution of leaflets would cause litter as unimportant in comparison with the exercise of First Amendments. The court found the terminal appropriate for use as a public forum and even directed that the protestors be permitted to set up tables in the terminal for their literature.

This opinion of the Third Circuit is not, however, controlling in Illinois and it clearly goes further than the present rulings of the Supreme warrant. Under the *Logan Valey Plaza* decision of the Supreme Court, there is no justification for such a drastic intrusion as that ordered by the Third Circuit so long as reasonable alternative channels of communication exist.

At O'Hare reasonable alternative means of communication are available to the union. Whereas picketing near a ticket counter seems calculated to interfere with the complex, precise informational and clerical work which is regularly accomplished there on a high speed basis, with consequent probability of severe inconvenience to the travelling public serviced there in great numbers, the automobile and bus loading area contains a broad sidewalk physically no different from a sidewalk in the city, particularly one in front of a hotel. Legally, this sidewalk, though privately owned by the City in its proprietary capacity, seems quite similar to the sidewalk in a company town in *Marsh* v. *Alabama,* 326 U.S. 501 (1946), access to which for purposes of communication the Supreme Court found to be required by the First Amendment.

Therefore, the order of Judge Robson in *Nelson* v. *City of Chicago,* 9 Aviation Cases 17,878 (1965), which restricted picketing at O'Hare Airport to that sidewalk, is still based on good law.

Our answer to the inquiry is that picketing, even though peaceful, may be prohibited in areas near airline ticket counters and at any other place inside the terminal buildings at Chicago-O'Hare International Airport.

RIGHT OF AIRLINE TO SUBLEASE TICKET COUNTER OFFICE SPACE AT O'HARE

(Department of Aviation—R. L. H.—February 5, 1971)

Your letter of January 27, 1971, advises us of a practice at O'Hare where itinerant airlines, not based here, come in and use other airlines ticket counter office space and other areas in the International Terminal Building. The attachment to said letter is a copy of an agreement that KLM Royal Dutch Airlines have promulgated to be entered into with such itinerant airlines as desire to utilize their facilities and pay for same on an hourly basis. Your letter further requests our opinion as to the legality of the aforementioned arrangements.

Your attention is directed to a certain agreement entered into between the City and various International Airline Carriers for lease of terminal facilities at O'Hare, as authorized by the City Council on June 10, 1970 (C.J.P. pp. 8685-8696).

Section 1.08 of this agreement gives any of the signatory Airlines a right to partially sublease any of the premises leased by them to any other Airline Party. Section 15.08 of the said agreement defines "Airline Parties" as being those air carriers who have agreements with the City substantially the same as the Airport Use Agreement. Section 16.05 of the said agreement permits a signatory Airline to sublease any premises leased by them *with consent of the City* in all instances other than those covered by Section 1.08 referred to hereinabove (emphasis added).

Pursuant to the foregoing clauses appearing in the agreement to which KLM is a signatory party, the practice employed by KLM in relation to the itinerant airlines is prohibited unless City Council approval is first obtained.

If there is need for this hourly sublease of premises, we would suggest that an ordinance be submitted to the City Council requesting approval of such sublease arrangements.

SUBLEASES AT MUNICIPAL AIRPORTS

(Commissioner of Aviation—R. L. H.—July 14, 1972)

Your letter of June 29, 1972, in the above matter requests our opinion as to whether the City should charge an override on subleases and whether such charge would be legal. You further request specific answers to three questions.

Whether or not an override is to be charged is a policy decision and not within the province of this department. We see nothing legally objectional, however, if it is determined to do so.

The Answer to your specific questions are as follows:

1. Yes, the City may legally require an override.

2. Yes, the City may legally require an override and no, this would not have to be in the sublease itself; it could be in a separate three-party agreement setting forth the terms and conditions for the City's consent to the sublease.

3. It appears that a general rule would be difficult to formulate since very possibly the question of override and its form would be handled on an individual basis. If a general rule were formulated, it could apply at all airports. Again, whether or not it should apply at all airports would lie in the realm of policy.

Section B. CONSTRUCTION

ACQUISITION OF PROPERTY FOR "CROSSTOWN" PURPOSES

(Commissioner of Public Works—F. S. L.—January 26, 1970)

Some time ago, your Assistant Commissioner Elizabeth McLean submitted to us for our opinion, a plat showing proposed development at 67th Street and South Cicero Avenue by the Crosstown Expressway.

Specifically, you ask our opinion as to the ownership of property shown on the plat as in use by the Belt Line Railway. You further ask what legal restrictions, if any, may be imposed for use in the comprehensive program for Crosstown purposes and whether the property can be condemned if necessary, for related Crosstown purposes, viz. as new industrial park to replace other dislocated industry.

We have made a detailed study of the title of the subject property by examining records of the Recorder's Office of Cook County, the Chicago Title and Trust Company, the Journal of Proceedings of the City Council of May 18, 1901 and files of the Circuit Court of Cook County. We have received preliminary plans of Crosstown Associates for use of the subject property.

We find that the subject property was owned by the City of Chicago in trust for the use of schools and in 1901 was used for farming purposes, and that the City Council of the City of Chicago did adopt an ordinance at the written request of the Board of Education declaring the property to be no longer necessary, appropriate or requisite for the use of the City of Chicago and not profitable to said city and not in the best interests of the city for further retention and asking for sale to the highest and best bidder for cash with no bid to be considered for less than $100,000.00

We find that, thereafter, the Chicago Union Transfer Railway Company filed a petition to condemn said subject property (Circuit Court of Cook County No. 219468) for the purposes of constructing thereon its connections, yards, tracks, warehouses, stations and appurtenances and that pursuant to such petition to condemn and amendments thereto, a jury made an award on July 22, 1901, to the City of Chicago in trust for the use of schools, the sum of $100,000.00 as full and just compensation for the premises sought to be taken and a judgment order was entered thereon the same day.

Although by a provision of the Illinois Constitution, it would appear that railroads were and are restricted to acquisition of an easement only through condemnation, it appears that in the instant case, to all intents and purposes, fee simple title has been transferred. The declaration by the governing body that the property was no longer necessary or desirable for public use, the stated full fee value of not less than $100,000.00, the avowed purposes set forth in the petition to condemn, the verdict in the amount of $100,000.00 all point to a conclusion that the city was paid the fair full value of the property for full title.

In addition, the uses for which the railroad has for the property are for the most part the same as the Crosstown developers have—a warehousing or industrial development taking advantage of the availability of the trackage already installed or capable of being installed to service the area. We conclude that while the fee title remains in the City of Chicago in trust for the use of schools, it is burdened with an easement for railroad purposes that is nearly equal to the same legal rights as a fee title.

We, therefore, believe that if this property or any portion of it becomes necessary for Crosstown purposes, it will become necessary for whatever governmental agency assigned to this segment of Crosstown right of way acquisition responsibility to acquire the easement by purchase or condemnation.

We believe that there are enough similarities in this case to make applicable the opinion of the Supreme Court in *Abens* v. *Chicago, Burlington & Quincy Railroad Co.* 388 Ill. Sup. 261 (1944). In the Abens case, the railroad acquired an easement for all purposes which were essential to the uses and purposes for which it was condemned and had delayed the construction of elevated tracks and structure meanwhile using the condemned lands for billboards and a parking lot and now railroad uses. The Supreme Court held the railroad acquired an easement while the fee subject to the easement remained in the former owner, that the fee owners may use the land for every purpose not incompatible with the use for which the easement was created but as to all rights attendant to the easement, those of the railroad are superior to those of the owner. The scope of the use which the railroad may make of the tract is limited to such as are essential to enjoy the uses and purposes for which it was condemned (*City of Chicago* v. *Lord* 277 Ill. 397).

The court further went on to say that the rule in Illinois is that an easement acquired by a railroad company in an eminent domain proceeding for right of

way purposes gives the company the right to the exclusive possession of the land taken. There are many cases in Illinois which hold to this rule.

While Section 13, Article II of the Illinois Constitution provides that the fee of land taken for railroad tracks without consent of the owners thereof, shall remain in such owners subject to the use for which it is taken, the argument can be clearly made that in the instant case, the city council, at the specific request of the Board of Education, declared the property surplus, ordered it sold for a stated minimum price and sold the property with full intention of selling it in its entirety.

For all practical purposes, the railroad owns all of the property it acquired through the eminent domain proceedings, albeit only an easement. The petition to condemn, the verdict and the judgment order all are silent as to the estate acquired but the uses past, present and allowable in the future all rule out inconsistent uses by the highway building agency, without acquiescence of the railroad.

It would, therefore, be necessary for the condemning agency to acquire and pay for such space as may be required for the foundations, footings and air space for decking for the highway. And it will require the payment of the fair cash market value for such needs. (*City of Chicago* v. *Sexton* 408 Ill. 351 (1951) and any damages to the remainder.

In accordance then with your request as to the procedure to be followed, we recommend that attempts be made to negotiate with the Belt Line Railroad (successor to Chicago Union Transfer Co.) for as much property as you deem necessary for your needs.

RESPONSIBILITY FOR REPAIRS TO EXPRESSWAY BEFORE LOCATION IS ACCEPTED

(Commissioner, Department of Public Works—J. E. S.—November 3, 1969)

Your Department recently requested our opinion concerning responsibility for repairs to the guard rail along the Dan Ryan Expressway.

In denying the claim the State Division of Highways cited Section 7.23 Standard Specifications for Road and Bridge Construction claiming that the contractor therein is made responsible for all damage until the location is accepted.

It is submitted that said article contains an exception therein, that when the work is opened to traffic by written order of the engineer, the provisions of this article shall not apply to damage caused by such traffic not due to the contractor's fault or negligence. It is the understanding of this Department that throughout the time the work was going on, the Dan Ryan Expressway was open to traffic and that the traffic thereon was the cause of the damages to the guard rail.

Predicated upon such understanding, it would be our opinion that the damage would fall within the above stated exception and that even though the contract proper was not directly related to the Dan Ryan Expressway, the damages incurred would be the responsibility of the State Division of Highways under its overall responsibility to maintain the Dan Ryan Expressway and necessary appurtenances thereto of which one of these would be the guard rail.

FEDERAL HIGHWAY RIGHT-OF-WAY TO PASS OVER ILLINOIS CENTRAL R. CO. LAND

(Commissioner, Department of Public Works—F. S. R.—January 8, 1971)

In response to the U. S. Department of Transportation letter of November 27, 1970, we point out the following:

There are in existence easements given by the Illinois Central to the South Park Commissioners and the City for rights of way across its land from the western to the eastern boundaries thereof for the purpose of extending existing streets which abut the western boundary of Illinois Central's property. These easements were granted by the 1919 ordinance (still in effect) and the 1912 agreements (still in effect). Under the terms of Article II, Section 5 of the 1919 ordinance the right of the City to extend streets by viaduct over the property of the Illinois Central without compensation, provided that the viaducts be "in line with the projection eastward of any east and west streets". It is apparent that such easement rights would not have in any way been adequate for the Federal Interstate Highway nor would the construction of that improvement conform to the specifications set up in the easement grants limiting the character, size, use and location of the proposed short extensions of existing streets. The terms of the grants are so definite that it is impossible that the grant would or could be construed to permit the construction of this limited access highway on the theory that it is a street extension such as those set up in the grants in Article II, Section 5 and Specifications B of the 1919 ordinance.

The 1912 agreements were similar in all respects to the 1919 ordinance as to the street easements with the exception that the number of streets which could be extended was limited to four per mile. The character and location and the extent of that part of the Federal highway over the railroad property definitely cannot by any means be considered in the same class as viaducts construed subject to the terms and conditions of the easements granted under the 1912 agreements.

The City and the Railroad in effect have altered the conditions of the 1919 ordinance and 1912 agreements as a result of the right of entry given by the Railroad and the construction of the Southwest Superhighway in that part of the railroad holding subject to the 24th Street and 25th Street easement, because complete eastward extensions of 24th and 25th Streets are now impossible. This change of condition is a factor that should be given consideration by the appraisers. The other easements may or may not be given consideration as the appraisers may determine.

Undoubtedly the easement rights given by the Railroad in the area in question would have some effect upon the value of the part taken and damages to the remainder and would be given consideration by such experienced and knowledgeable appraisers taking note that these easements are still in effect except as set forth above.

In connection with this Federal Highway right-of-way, the only thing given by the Illinois Central Railroad was the right of immediate possession of the property required pending the determination of title and the fixing by a jury of the amount to be paid for the property taken and any damage to its remainder on the day the condemnation proceeding was commenced. The only interests in the area were those of the railroad and the easement rights of the City and Park District. The City and the Park District may exercise these easements for the definite purposes outlined in the 1912 agreements and 1919 ordinance. (The Chicago Park District succeeded to the interest granted to the South Park Commissioners). The State of Illinois has no interest in the easement rights granted.

The letter calls attention to the provisions of the 1919 ordinance relating to the matter of the easement grants for extensions of existing streets across the

Illinois Central right-of-way by means of viaducts and notes the provision for ramps is part of the extension right permitted in the easement area and then intimates that the connections with the Southwest Expressway are ramps in the same class as the ramps in the street extensions of the 1919 ordinance easements.

The ordinance of 1919 and the 1912 agreements have no provision regarding the use of any of the Railroad's property for any purpose other than the specified easements granted for extension of the streets abutting the west border of its property. A most careful examination of the ordinance of 1919 and the agreements of 1912 disclose no provision concerning the matter or ramps in any other part of its property than that within the specific lines of the granted easements. There has been no conveyance to the City or Park District by the railroad for street extensions other than those referred to in the agreements of 1912 and in the 1919 ordinance. Moreover, the ramps in the improvement built on the property of the Railroad are not street extensions of any kind whatsoever. Therefore there is no basis for any claim of right to use any other part of the Company's property without the payment of compensation.

JUST COMPENSATION

(W. F.—H. A. C.—October 31, 1967)

In reply to your letter addressed to Mayor Richard J. Daley of the City of Chicago, seeking information regarding the legal regulations which would affect businessmen who claim damages as a result of subway construction affecting their interests, together with legal decisions on the subject in American courts, the following statement reflects largely Illinois experience with this matter.

Under Chapter 24, Section 11-121-2 of Illinois Revised Statutes of the years during which the subway was being constructed in Chicago, (about 1949-50), any municipality in Illinois could condemn property needed for the construction of subways. Furthermore, under the State and Federal Constitutions, private property could not be taken for public use without just compensation. However, the courts interpreted this to mean the physical damage to property, and not the loss of profits by businessmen due to the construction of any public works. Thus, in *People* v. *Kelly,* (1960) 17 Illinois (2d) 602, (an Illinois Supreme Court case), it was held that where no part of the property involved was physically taken, the City or other sovereign was not required to institute proceedings to ascertain the damages, though damages might be recoverable in an action at law.

A distinction was thus drawn between procedure under the Eminent Domain statute applicable in all cases where private property was taken for public use, and an action under the general principles of case law. In the latter action, the basis for recovery could be negligence, while in the case of a dangerous activity, —such as the boring of tunnels for subways or other purposes—the basis of recovery at common law would be absolute liability (regardless of negligence) for intrinsically dangerous work, as in *Macer* v. *O'Brien* (1934), 356 Illinois Supreme Court Reports 486. A Municipality is liable of such cases, even though the fault is with one who contracts with the City to do the work (*Ibid.*).

In spite of the fact that the City was involved in a substantial number of cases where people sued because of damage due their property and/or business, there are no recorded cases, because very few went as far as the Appellate Courts, and even these decisions were not published. In no case was any award permitted for loss of prospective profits from interference with business operations, either because the statute had not provided for this type of damages, or because such damages were highly speculative and difficult to prove.

As for loss of profits as an element of damages, the general rule of law in Illinois apart from statute, is that there may be recovery for loss of profits, only if the loss of profits is such as may be expected to follow from the wrongful act, and if they are certain and ascertainable; but such recovery is denied where the profits are uncertain, speculative, or remote (*Corpus Juris Secundum,* Volume 25,

Section 42). For another view on this subject we refer you to McCormick's *On Damages,* page 538.

The attitude of the Illinois Supreme Court on the subject of loss of profits is shown in the case of *Housing Authority* v. *Kosydor,* 1960, 17 Illinois 2d 602, in an eminent domain matter. where, after holding that the expense of moving personal property was not recoverable, the Court added that a prospective return on an investment is not an allowable item of damages in such cases, since such a loss is one of the burdens of citizenship where private property has to be taken or damaged because of a necessary public construction. In *Barnard* v. *City of Chicago,* 270 Ill. 27, it was held that losses from the blocking of ingress and egress to buildings during a tunnel excavation by the City must be compensated, but the basis of recovery was the interference with the right of the owner in the full use and enjoyment of his property.

FINANCING OF CONSTRUCTION AND RECONSTRUCTION OF McCORMICK PLACE

(Mayor, City of Peoria—S. R. D.—January 28, 1969)

Mr. Raymond F. Simon has requested the undersigned to collect the information requested in your letter of December 12, 1968, pertaining to the financing of the original construction and restoration of McCormick Place. Due to circumstances presently existing at McCormick Place, we were delayed in securing the desired information from Mr. William D. North of the law firm of Kirkland, Ellis, Hodson, Chaffetz & Masters, who are the attorneys for McCormick Place. We are attaching a xerox copy of a letter we received from Mr. North, which is self-explanatory.

We wish to add our comments to those of Mr. North. The Metropolitan Fair and Exposition Authority Act (Ill. Rev. Stat. 1967, Chap. 85, pars. 1221 to 1248, inc.) was enacted in 1955 and is limited to the County of Cook (par. 1222).

Section 10 of the Act (par. 1230), which authorizes the Authority to borrow money and issue bonds, provides, in part, as follows:

> "All such bonds shall be payable solely from the revenues or income to be derived from the fairs, expositions and exhibitions and other authorized activities operated by it, and from funds, if any, received and to be received by the Authority from the Fair and Exposition Fund, as allocated by the Department of Agriculture of this State."

Section 6i of the State Finance Act (Ill. Rev. Stat. 1967, Chap. 127, par. 142i) provides, in part, as follows:

> "Money shall be paid into the Fair and Exposition Fund by the Illinois Racing Board, as provided in Section 6 of the "Illinois Racing Act", filed June 13, 1927, as heretofore or hereafter amended. The General Assembly shall from time to time make appropriations payable from such fund to the Department of Agriculture for distribution to county fairs in counties having a population of less than 500,000 and to any fair and exposition authority in counties with a population of 500,000 or more. Such appropriations shall be distributed by the Department to such county fairs which are eligible to participate in appropriations made under Section 28 but which elect instead to participate in appropriations made pursuant to this Section and to such fair and exposition authorities in counties having a population of 500,000 or more."

Section 6 of the Horse Racing Act (Ill. Rev. Stat. 1967, Chap. 8, par. 37f) provides, in part that "that part representing 1% or one-half of the balance collected, whichever may be the lesser amount, shall be paid into the Fair and Exposition Fund in the State treasury."

We have examined the Annual Report of the Metropolitan Fair and Exposition Authority for the year ending June 30, 1963, and find that the net increase from operation of building and facilities was $343,505 and that the sum of $1,727,285 was received from the State of Illinois, Department of Agriculture—Fair and Exposition Fund.

In 1967 the Legislature passed the Fair and Exposition Authority Reconstruction Act (Ill. Rev. Stat. 1967, Chap. 85, pars. 1250.1 to 1250.10) which provided, among other things, that the Metropolitan Fair and Exposition Authority "is authorized to borrow money and issue bonds in a total amount not to exceed $40,000,000 for the purpose of reconstructing the convention hall and exposition building known as McCormick Place."

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